Reports of Cases
In the Court of King's
Bench

1810

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

ERRATA.

Page 39, in the margin, for *joint-tenants*, read *parceners*.
63, line 28, for *T. G* read *J. F.*
240, — 3, for *plaintiff* read *defendant*.
398. for Hopkins v. *Vaughan* read *Thorne*.

A

T A B L E

OF THE

CASES REPORTED

IN THIS TWELFTH VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

 David-

Rex

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty Year of the Reign of GEORGE III.

1810.

LEEDS *against* BURROWS.

Wednesday, Jan 24th.

Where an agreement between an outgoing and an incoming tenant was that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expence of repairing the gates and fences of the farm; and that the value of the hay, &c. and of the repairs, should be settled by third persons; held that the balance settled to be due to the outgoing tenant for his hay, &c. after deducting the value of the repairs, might be recovered by him in a count upon a general indebitatus assumpsit for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. And nothing being referred to the appraisers except the mere value of the goods and of the repairs, an appraisement stamp upon the written valuation is sufficient under the stat. 46 G. 3 c. 43, and an award stamp is not necessary.

THIS was an action on the case on promises. The first count of the declaration was framed upon a special agreement, and stated that the plaintiff, being possessed of a certain farm, as tenant to *T. W. C.*, on which farm he had 70 tons of hay and a spike roll, on the 11th of *Oct.* 1808, in consideration of the premises, and that the plaintiff, at the defendant's request, would relinquish to him the hay and spike-roll, and leave the same

1810.

LEEDS *against* BURROWS.

fame on the farm for his ufe, the defendant promifed to pay the plaintiff fo much money as certain referees fhould appraife and value the goods at. And then the plaintiff averred that he did relinquifh the hay and fpike-roll to the defendant and left them on the farm for his ufe; and that the referees valued and appraifed the goods, and determined that the defendant fhould therefore pay to the plaintiff for the fame, and for and in confideration of the premifes, 184*l.* 4*s.* The fecond count was upon a general indebitatus affumpfit for a certain fum for hay and farming utenfils fold and delivered by the plaintiff to the defendant. The third count was upon a quantum valebant; and there was alfo one upon an account ftated, together with other common money counts.

It appeared at the trial before Lord C. J. *Mansfield* in *Norfolk*, that the plaintiff was the outgoing and the defendant the incoming tenant of a farm, and that it had been agreed between them that the referees fhould value the hay and the fpike-roll, for which the defendant was to pay, and fhould alfo eftimate the value of repairs for gates and fences on the farm, which the plaintiff was to make good. That by a memorandum in writing, on an appraifement ftamp, that the plaintiff was the outgoing and the defendant the incoming tenant, and that the plaintiff at the time of his quitting had a ftack of hay and a fpike-roll on the farm, which he *fold and agreed to leave* to the defendant, and the defendant did *purchafe and agree to take* at fuch fum of money as they (the referees) fhould *value and appraife* the fame; ftated that they (the referees) having met and examined the hay and fpike-roll, and confidered their value, did appraife and value the fame at 184*l.* 4*s.* This was figned by the referees,

ferees, and dated 7th *March* 1809; and on the other side of the same paper, was written "7th *March* 1809.

"The hay and roll valued at -	£184	4	0
"To deduct therefrom for repairs of "gates and fences - -	6	16	0
"Due to Mr. *Leeds* -	177	8	0

and this was also signed by the referees. It was thereupon objected that it was part of the agreement that the appraisers should value the repairs of the gates and fences, and that there was a variance between the agreement laid and that proved. This objection was admitted by the Chief Justice; and though the plaintiff's counsel insisted that he was entitled to recover either on the special or the general count, the plaintiff was nonsuited.

Sellon Serjt., (with *Frere* Serjt.) moved in the last term to set aside the nonsuit, 1st, upon the ground that the plaintiff was not obliged to set out more of the agreement in the special count than was necessary to entitle him to recover the value of the goods sold by him to the defendant, as ascertained by the appraisers. [But on this ground *The Court* were of opinion that the plaintiff had failed in proving the special count. They said it might have been part of the consideration which moved the defendant to agree to take the hay and spike-roll at the valuation of the referees, that they should allow him so much for the repairs of the gates and fences, to be paid by the plaintiff; and therefore the plaintiff had stated the consideration for the agreement on the part of the defendant too shortly.] He then contended that as the contract was executed, and the defendant had gotten the hay and spike-roll, the plaintiff was entitled to recover on the ge-

 neral

1810.

LEEDS against BURROWS.

neral count for goods sold and delivered. And on this ground the Court granted a rule nisi.

Peckwell Serjt. now shewed cause, and urged a preliminary objection, which he had taken at the trial to the evidence given of the valuation of the plaintiff's goods by the instrument in writing, which had a 10*s*. appraisement stamp (*a*) instead of an award stamp, which is of a higher denomination, as he contended it ought to have had; the reference including a right of action for damages done to the estate. [*Le Blanc* J. observed that it was only left to the persons, to whom the matter was referred, to put a value upon the articles which the parties had already agreed should be paid for: and therefore it seemed more properly to be a valuation or appraisement than an award, within the meaning of the stamp acts. But waving this point, which was not referred to in the Chief Justice's report, the defendant's counsel was asked what objection he had to urge against the plaintiff's right to recover the value of those goods on the count on the general indebitatus assumpsit?] To this he answered that, if resort could be had to it in this case, it would equally avail in every case, however special the contract as to the mode of payment, after the time arrived when the payment was agreed to be made. But he contended there was a distinction in cases of this description, where the payment was to be made not altogether in money, but partly in doing or receiving other things; as here the

(*a*) The stat. 46 *G.* 3. *c.* 43. lays an ad valorem stamp on every piece of paper, &c. "upon which any valuation or appraisement, or the amount "of any valuation or appraisement of any estate, property, or effects "real or personal, or of any interest in possession, &c. or contingency in "any estate, &c. shall be written or set down in figures."

goods

goods were in part to be paid for by the allowance to be affeffed for the repair of the gates and fences. As it is faid in *Hard*'s cafe (*a*), that a general indebitatus affumpfit will not lie upon a mutual affumpfit; and the fame principle was admitted in *Barbe* v. *Parker* (*b*), where feveral other cafes are cited to the fame effect.

GROSE J. (*c*) faid, that he faw no reafon why the plaintiff might not recover on the general count the value of his goods, which had been fold to the defendant and taken poffeffion of by him, deducting the value of the repairs which were to be allowed.

LE BLANC J. The fallacy confifts in not confidering the plaintiff's claim as arifing for goods fold and delivered to the defendant, as the fact really is, but in affuming that the claim of the one party was in confideration of what was to be done on the part of the other. The plaintiff's claim is founded upon the fale and delivery of hay and a fpike-roll to the defendant; and the agreement between them in effect is no more than this, that as the plaintiff was indebted to the defendant for fomething elfe, as foon as the amount of the defendant's claim was afcertained, it fhould be taken in part payment of what was to be paid to the plaintiff for the hay and fpike-roll. If it had not been fo agreed to be deducted, it would have been a fubject of fet-off; but being agreed to be taken as part payment, it ftill leaves a fum due to the plaintiff for goods fold and delivered.

BAYLEY J. The whole of the plaintiff's demand was for goods fold and delivered; though he is not entitled

(*a*) 1 *Salk.* 23. (*b*) 1 *H. Blac.* 287.
(*c*) Lord *Ellenborough* C. J. was abfent.

1810.

LEEDS *against* BURROWS.

to recover the full value of his goods, becaufe that would be contrary to his agreement to allow for the value of the repairs in part payment: the balance, therefore, is the only debt; but that is altogether for goods fold and delivered.

Rule abfolute (*a*).

(*a*) The plaintiff having recovered a verdict for the balance on the fecond trial before *Grofe* J., *Peckwell* Serjt. moved in *Eafter* term following to enter a nonfuit, upon the fame objection as to the ftamp, taken at the trial; that the agreement included a reference of a right of action for damages done to the eftate; which, he urged, was not within any of the words of the appraifement ftamp act defcriptive of the property to be valued. But Lord *Ellenborough* C. J. faid that it was only appointing perfons to fettle an account of what was due between the parties for the value of the different articles. The parties had no contemplation of fubmitting any differences to the award of arbitrators, and no fuch terms ought to be impofed upon them againft their own meaning and the meaning of the ftamp acts. The Court therefore refufed a rule.

Wednefday, Jan. 24th.

POWELL *againft* EDMUNDS.

Printed conditions of fale of timber growing in a certain clofe, not ftating any thing of the quantity; parol evidence, that the auctioneer at the time of fale warranted a certain quantity, is not admiffible, as varying the written contract.

The fame paper containing two different contracts for the purchafe of different lots by different perfons, one ftamp affixed on that part of the paper which contained the contract of fale with the defendant, and to which the ftamp officer's receipt for one penalty referred, is fufficient to legalize the evidence of fuch contract.

THE Plaintiff declared, that on the 14th of *April* 1806 he was entitled to fell timber trees growing in a certain clofe, &c. and authorized *W.*, his auctioneer in that behalf, to fell by auction the faid timber, fubject to certain conditions of fale, by which it was provided (inter alia) that the timber fhould be put up in two lots, and that the purchafer fhould pay down to the auctioneer 10*l.* per cent. in part of his purchafe money, and fign an agreement for the payment of the remainder by the 25th of *March* 1807. He then averred that the defendant

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became the purchaser at the sale of lot 1 for 700*l.*, and in part performance of the conditions of sale deposited 70*l.*, and signed an agreement to fulfil the conditions of sale; and in further performance of the conditions paid to the plaintiff, in part of the said purchase, 529*l.*: but though, after the sale and after his undertaking, viz. on 1st *Sept.* 1807, the defendant, with the plaintiff's permission, entered on the said close, and cut down, converted, and carried away the said timber trees; yet he did not, on or before, or since, the 25th of *March* 1807, pay to the plaintiff 101*l.* the residue of the 700*l.*

At the trial, before *Thomson* B. at *Hereford*, the auctioneer proved that he was employed by the plaintiff to sell the timber for him: that the sale, which had been previously advertised, took place on the 14th of *April* 1806: that written conditions of sale were then publicly read; which conditions were produced by him, together with the advertisement to which they referred, and which merely described the time and place of sale, and the number and kind of timber trees in each lot, saying nothing as to the weight of the timber. The defendant was the highest bidder for lot 1, at 700*l.*, and signed the agreement for that lot upon the back of the conditions of sale, as follows; "*April* 1806—I agree to become the purchaser of lot the first, at 700*l.*, and agree to fulfil the conditions of sale. *A. Edmunds.*" A 16*s.* stamp was impressed on that part of the paper on which the above agreement was written: but a little below that was another agreement with another purchaser of lot 2; viz. "*April* 1806. I agree to become the purchaser of lot 2, "at 335*l.* and agree to fulfil the conditions of sale. "*G. Munchley.*" This last agreement had pencil marks

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1810.

POWELL *against* EDMUNDS.

drawn across it, as if for the purpose of striking it out: and below both these agreements the following receipt was written. "Stamp Office, *July* 1st, 1809. Received "of Mr. *Pewtriss* (*a*) the sum of ten pounds for marking "the above agreement with a 16*s*. stamp. Received "at the same time 16*s*. for the stamp. *W. Pilking-* "*ton, P.R.G.*" The defendant's counsel objected to the reading of the agreement signed by the defendant, on the ground that there was upon the same paper two distinct agreements by two different purchasers, for different lots, and only one penalty paid and one stamp affixed to the paper: but the learned Judge over-ruled the objection, considering that the stamp must be taken to belong to that agreement upon which it was impressed; which was that signed by the defendant. The defendant's counsel then asked the auctioneer, on cross-examination, whether when the bidding amounted to 550*l*. any conversation took place from him to the company as to what quantity of timber was contained in the lot? and this question having been objected to on the part of the plaintiff, the defendant's counsel stated that they proposed to shew that there was a warranty by the auctioneer, that the quantity of timber contained in lot 1 would amount to 80 tons. The plaintiff's counsel still objected to such evidence, there being no such warranty contained in the written conditions of sale; but stated that, if it were necessary, they were prepared to shew that the defendant had carried away the whole timber. The learned Judge, however, was of opinion, that parol evidence of the warranty as to quantity was inadmissible; and the plaintiff had a verdict for 101*l*., which was the whole balance remaining unpaid.

(*a*) The plaintiff's agent.

Jervis

Jervis moved in the last term, and he and *Wigley* were now heard in support of a rule, to set aside the verdict, and either to enter a nonsuit upon the first objection, if the evidence of the contract had been improperly received for want of a stamp; or to have a new trial, if the parol evidence of the warranty made by the auctioneer at the time of the sale had been improperly rejected. On the first point they contended that the stamped paper, having two distinct agreements written upon it, ought to have had two stamps; it being uncertain to which of the two agreements the single stamp now upon the paper related; and that it might thus be made to serve the purpose of either: that the part of the paper on which the stamp was impressed, and on which the agreement in question was written, could not make any difference. And they cited *Rex* v. *Reeks* (*a*), where in a trial at bar on an information in nature of quo warranto, to prove the admission of the defendant into the office of burgess, a paper was produced containing the admissions of him and four other burgesses, having only one stamp; and though four other pieces of paper, each duly stamped, containing the admissions of those four other burgesses, were produced, yet the Court rejected the evidence, on the ground that they could not apply the single stamp on the first paper to the defendant more than to either of the other persons named in the same paper. The defendant's name was not indeed the first of the five on the paper; but the Court do not appear to have decided the case on that distinction; and indeed it seems to have been done away by shewing the admissions of the others on separate papers properly stamped. And in *Gilby* v. *Lockyer* (*b*), it was held that two or more defendants in different actions

(*a*) 2 *Ld. Ray*, 1445, and 2 *Stra.* 716. (*b*) *Dougl.* 217.

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1810.

Powell *against* Edmunds.

could not be held to bail on one affidavit, as being a fraud on the ſtamp laws. In ſupport of the ſecond objection, they obſerved that the parol evidence offered did not go to contradict the written conditions of ſale, which were ſilent as to the *quantity* of timber contained in each lot: it went merely to ſupply that defect; and was therefore diſtinguiſhable from *Gunnis* v. *Erhart* (*a*), which was was relied on by the plaintiff's counſel as in point againſt the reception of the evidence at the trial. [Lord *Ellenborough* C. J. ſaid it was the ſame thing in effect, if the parol evidence went to introduce a new term into the written agreement: and he referred to *Meres* v. *Anſell* (*b*), where the ſame diſtinction was urged and over-ruled.] The parol evidence there offered went to extend the written agreement to another ſubject matter, to include the ſale of graſs of another meadow beſides the one mentioned in the agreement. [Lord *Ellenborough*. Does it not materially vary the contract, if it make that a contract for the ſale of a definite quantity of timber, which before was indefinite?] It is not inconſiſtent with the conditions of ſale.

Dauncey and *Abbott*, in anſwer to the firſt objection, referred the Court to the inſpection of the ſtamped paper, which ſhewed that the ſtamp was affixed on the agreement in queſtion, and to which the receipt of the proper officer for the penalty in terms referred. In anſwer to the ſecond, they relied on *Gunnis* v. *Erhart*, and *Jenkinſon* v. *Pepys* (*c*), in the Exchequer; in which latter, parol evidence of

(*a*) 1 *H. Blac.* 289. (*b*) 3 *Wilſ.* 275.

(*c*) Cited in the *Marquis Townſend* v. *Stangroom*, 9 *Veſ jun.* 330. In courts of equity the evidence is admiſſible in oppoſition to a bill for a ſpecific performance, or on the grounds of miſtake, ſurprize, or fraud.

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what the auctioneer faid at the time of the fale of an eftate, in order to explain an article as to the woods, which was thought to be ambiguous, was rejected.

Lord ELLENBOROUGH C. J. There is no doubt that the parol evidence was properly rejected in this action. The purchafer ought to have had it reduced into writing at the time, if the reprefentation then made as to the quantity fwayed him to bid for the lot. If the parol evidence were admiffible in this cafe, I know of no inftance where a party may not by parol teftimony fuperadd any term to a written agreement; which would be fetting afide all written contracts and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of fale. The only queftion which could be made is, whether if by a collateral reprefentation a party be induced to enter into a written agreement different from fuch reprefentation, he may not have an action on the cafe for the fraud practifed to lay afleep his prudence. It is not neceffary, however, to difcufs that at prefent.

The other Judges agreed with his Lordfhip on this point: and all the Court concurred alfo in over-ruling the other objection, with refpect to the ftamp.

Rule difcharged. (a)

(a) Vide *Higginfon* v. *Clowes*, 15 *Vef. jun.* 516.

1810.

Thursday, Jan. 25th.

Browne, D. D., *against* Renouard, Clerk.

Conusance of a plea of trespass sued against a resident member of the University of *Cambridge* for a cause of action verified by affidavit to have arisen within the town and suburbs of *Cambridge*, over which the university court has jurisdiction, was allowed upon the claim of the vice chancellor on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by act of parliament, and averring the cause of action to have arisen within such jurisdiction. Though it was objected,

1st, That the claim of conusance was stated on the roll to be made by the attorney of the V. C., when the power which constituted the person attorney was executed by the V. C., as V. C. and deputy of the chancellor, masters, and scholars of the U.; and therefore that the claim ought to have been made by the attorney in their names But it sufficiently appeared that he was attorney for the V. C. claiming ex officio.

2dly, That the claim was preferred too early, upon the mere issuing of the writ of latitat against the privileged member to answer in a plea of trespass, before declaration; by which it could not appear where the cause of action arose, and consequently that it arose *within the town and suburbs of* Cambridge to which the jurisdiction of the university court in personal actions is confined: and that it was not sufficient to supply that fact by affidavit. But held that it was the usual course to support claims of conusance by affidavits verifying the necessary facts, which it was competent to the plaintiff to deny in the same mode; and that the difficulty was not greater before than after declaration; and the sooner the claim, if well founded, was preferred, the better for the plaintiff.

3dly, That if the claim might be preferred upon the latitat before declaration, then it ought to be preferred *in the first instance* after the return of the latitat, namely, upon the day of appearance given by the rule of Court, *i. e.* in eight days. But held that *the first instance after the return-day of the writ*, which is the first step of the plaintiff entered on the record, continued till the declaration filed, which is the next step taken by the plaintiff on the record; within which time the claim was made.

4thly, That it appeared by the roll on which the power of attorney to claim the conusance, and the claim itself, were entered, that the claim was made on the return-day of the writ, *i. e.* the 15th of *Nov.*, before the power of attorney to claim it was executed, which bore date on the 27th. But the Court took notice that the claim was in fact made on the 28th in the letter missive and significatory of the V. C. to them; although in making up the roll it was entered by their officer as on the return-day of the writ by relation, no subsequent day in court being then given on the record.

5thly, That taking the letter missive and significatory of the V. C. to be the original and proper claim of conusance, it was defective in not alleging that the cause of action arose within the jurisdiction; and that this could not be supplied by the formal entry of the claim on the roll made by the officer of the court, in which that averment is made from the affidavit. But held that such averment made in the formal entry of the claim on the roll, verified by affidavit, of which the Court would take notice, was sufficient.

THE plaintiff sued out a writ of latitat against the defendant to answer him in a plea of trespass, which writ was tested on the 6th of *Nov.* 50 *Geo.* 3. returnable on *Wednesday* next after the morrow of *St. Martin*, being the 15th of *Nov.*, and was served on the 1[illegible]th of the same month. Whereupon certain affidavits were made, one by the defendant, which was sworn on the 28th of *Nov.*, stating the service of the process on him; that he had

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1810.

BROWNE *against* RENOUARD.

been for three years paſt and now is a conſtant reſident member in the univerſity of *Cambridge*, a maſter of arts, and fellow of *Sidney Suſſex* college. That the courts of the chancellor of the univerſity are regularly holden therein, for the trial of all cauſes within its juriſdiction; that he was liable to anſwer the plaintiff there; and that the cauſe of action, if any, aroſe within the liberty of the univerſity, viz., within the town and ſuburbs of the town of *Cambridge*. There were other affidavits by Mr. *Pemberton*, regiſtrar of the univerſity, verifying the matriculation of the plaintiff in 1782, now maſter of *Chriſt's* college, and of the defendant in 1798; and certificates of ſuch matriculations under the hand and ſeal of Dr. *Milner*, vice-chancellor of the univerſity, were alſo verified by affidavit; the ſeal being verified to be the ſeal of office belonging to him as V. C. And Mr. *Pemberton* alſo atteſted that Dr. *Milner* the V. C. affixed the ſeal of the office of the chancellor of the univerſity to the deed-poll thereto annexed, dated the 28th of *Nov.* 1809, and addreſſed to the Rt. Hon. *Edward* Lord *Ellenborough*, Ld. C. J. &c. and the reſt of the juſtices of this court, purporting to be a claim of conuſance of the above cauſe; viz.

The (*a*) Rev. *Iſaac Milner*, D. D. vice-chancellor, &c. to the Right Hon. *Edward* Lord *Ellenborough*, &c. greeting—Whereas by the ſpecial grace and favor of the anceſtors and predeceſſors of our ſovereign lord the now king, it is granted to the ſaid univerſity, and alſo by act of parliament confirmed and enacted, that the chancellor, maſters and ſcholars, and their deputies, ſhould have conuſance before themſelves of *all perſonal pleas*, as well of

(*a*) The full ſubſtance only of this document, which was not the formal claim of conuſance entered on the roll, is here ſtated.

1810.

Browne *against* Renouard.

debts, accounts, and all other contracts whatsoever and injuries, as of trespasses against the peace, and of all misprisions *within the town of* Cambridge *and its suburbs*, mayhem and felony only excepted, where any master and scholar or servitor, or common minister of the said university, should be one of the parties; and that all and singular such like pleas and trespasses aforesaid, the chancellor and scholars and their deputies and their successors should hear, hold, and finally determine wheresoever within the town and suburbs of the same town, as they should think fit, and execution thereof should make according to their laws and customs aforetime used, &c. And that the justices, &c. (the courts at *Westminster*, &c.) should allow conusance of all the aforesaid kinds of pleas, and that no justice, &c. should intermeddle concerning the said pleas, nor put the party to answer before them, but that that party before the said chancellor and his successors or their deputies there should only be acquitted or punished in form aforesaid, and not elsewhere or otherwise; and that all and singular writs in such like pleas and trespasses made contrary to the queen's (*Elizabeth's*) grant should be by law null. And whereas an action hath lately, as is alleged, been commenced in his majesty's said court of K. B. against the Rev. *G. C. R.* (the defendant) fellow of *S. S.* college, &c. M. A. &c. at the suit of *T. B.* (the plaintiff) D. D., and the said *G. C. R.* hath been served with a writ of latitat issued out of the said court at the suit of the said *T. B.* and therein returnable, &c. against the form of the privilege aforesaid; we certify and signify to you, that the said *G. C. R.* before and at the time of suing, summoning, and impleading aforesaid, was fellow of *S. S.* college aforesaid, and resident within the same, and registered in the book of maticulation

ticulation of the ſaid univerſity, and ſtill is a reſident member of the univerſity. Therefore we pray you, that by virtue of the privileges to us in this behalf granted, confirmed, and enacted, as ſoon as you ſhall have inſpected theſe our letters ſignificatory and claim, you will be pleaſed to ſuſpend all further proceſs and execution thereof againſt the ſaid *G. C. R.*, and him from your court freely to diſmiſs without any expence; and that you will be pleaſed to remit the conuſance and final deciſion of the ſaid action, &c. to us, according to the form and effect of the privileges aforeſaid; by virtue of which ſaid privileges him the ſaid *G. C. R.* for a perſon privileged and of the juriſdiction of the univerſity aforeſaid, and the conuſance and final determination of the action aforeſaid, we challenge and claim by theſe preſents. Dated under the ſeal of the office of the chancellor of the univerſity of *Cambridge* the 28th of *Nov.*, 50 *G.* 3. (Signed *Iſaac Milner*, vice-chancellor. (*L.S.*)

The affidavit alſo verified the ſigning and ſealing *on the 27th of* Nov. 1809, of a power of attorney, (which was entered on the roll) from Dr. *Milner*, as V. C. locum tenens and deputy of the chancellor, maſters, and ſcholars of the univerſity, appointing *W. W. Atkinſon* and *C. Pemberton*, and either of them, their attornies and attorney, to claim and defend the liberties and privileges of the univerſity in the ſaid action.

The roll on which this proceeding was entered was among the pleas of *Mich.* 50 *G.* 3. and firſt ſet out the ſaid letter of attorney, dated the 27th of *Nov.*; and next the latitat, returnable on the 15th of *Nov.*; and then it proceeds—On which day, i. e. on the 15th of *Nov.* in this ſame term, before our lord the king at *W.* comes the ſaid *T. B.* by *E. R.* his attorney, and offers himſelf againſt the

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1810.

BROWNE *against* RENOUARD.

ſaid *G. C. R.* in the plea aforeſaid, and the ſaid *G. C. R.* alſo comes by *W. W. A.* his attorney. And thereupon alſo cometh into court the Rev. *J. Milner*, D. D. vice-chancellor of the univerſity of *Cambridge*, and locum tenens or deputy of the Moſt Noble *A. H. Fitzroy* Duke of *Grafton*, the now chancellor of the ſaid univerſity, and the maſters and ſcholars of the ſaid univerſity, by *W. W. A.* his attorney above-named, to aſk and claim, proſecute and defend all and ſingular the liberties and privileges of him the ſaid V. C. and locum tenens or deputy; and thereupon the ſaid V. C. and locum tenens or deputy prays his liberty, i. e. to have conuſance of the plea aforeſaid before the ſaid chancellor, maſters, and ſcholars, or their locum tenens for the time being, to be held at *Cambridge*, becauſe he ſays, &c. And ſo he proceeds to ſet out the letters patent of the 3d of Queen *Elizabeth*, as ſtated in ſubſtance in the letter ſignificatory of the V. C. confirmed by the ſtat. 13 *Eliz. c.* 29. and further ſtating, as before, the matriculation and reſidence of the defendant in the univerſity before and at the time of the writ ſued out againſt him, *and that the cauſes of action, if any, aroſe within the liberties of the univerſity, i. e. within the town and ſuburbs of* Cambridge; concluding with claiming conuſance of the cauſe as in the ſaid letter; and proffering to the Court the letters patent of Queen *Elizabeth*, and the exemplification of the act of confirmation.

The rule, calling upon the plaintiff to ſhew cauſe why this claim of conuſance ſhould not be allowed, was drawn up on reading the ſaid claim of conuſance and the ſeveral affidavits and documents above-mentioned, together with the letters patent of Queen *Elizabeth*, and the exemplification of the act confirming them.

Marryat

Marryat and *Abbott* now oppofed the rule, and objected that this claim of conufance was neither made in due form nor in due time (*a*). 1ft, The power of attorney to claim the conufance, which is neceffarily entered on the record, is executed by the V. C. as deputy, and in the name of the chancellor, mafters, and fcholars of the univerfity in their corporate character; but the claim of conufance is made by the attorney of the vice-chancellor only; for it is faid,—" and thereupon alfo cometh into court *the Rev.* " J. M. *&c. V. C. &c.* by *W. W. A. his* attorney," &c. It might have been different if the V. C. had come into court in perfon, for then he might have been faid to come in his reprefentative character as deputy of the chancellor, mafters, and fcholars. The claim of conufance therefore, and the authority on which it is made, are not confiftent with each other.

As to this objection, it was ftated e contrà, that this was the common form in which the claim of conufance had always been made. That the feal affixed to the inftruments was that ufed by the V. C., and not the univerfity feal. And *the Court* were fatisfied that the V. C. muft be confidered as acting throughout ex officio on the part of the univerfity whofe officer he is.

2dly, It was objected, that the claim of conufance was entered on the record on the return-day of the writ, which was the 15th of *Nov.*; whereas the power of attorney, by virtue of which it was made, was not executed till 12 days afterwards, namely, on the 27th of the fame month. [Lord *Ellenborough* C. J. The claim is in fact made on the 28th of *Nov.*, as appears by the letter addreffed to us by the V. C. bearing that date. Then becaufe in making up the roll it is entered by our officer

(*a*) Vide *Leafingby* v. *Smith*, 2 *Wilf.* 406.

 under

1810.

Browne *against* Renouard.

under the date of the 15th, by relation to the last return day of the writ; can we take advantage of that, to reject the claim?] Then supposing it not entered till the 28th, it would come too late: for all claims of conusance, being analogous to pleas to the jurisdiction of the court, the party must come on the first day given by the court; and supposing the claim was properly made in this case, before the cause of action appears by the declaration, (which raises another objection to the claim) the claim ought to have been made on the 8th day after the return of the writ, which is the day of appearance for the defendant. [Lord *Ellenborough* C. J. What intermediate step has been taken in the cause between the return day of the writ, and the day when the claim was in fact made? Is there any continuance entered on the record?] No step appears by the record to have been taken in the mean time, because the day of appearance is not entered on the record; but the Court will take notice of its own rules of practice, by which the defendant must appear within eight days after the return of the writ in this case. The rule laid down in *Rex* v. *Agar* (*a*) is, that conusance must be claimed in the first instance: what shall be considered as the first instance must be regulated by the nature of the case. [Lord *Ellenborough* C. J. Is not the declaration the next step which the plaintiff takes by his own act after the return of the writ? Here then the university, having come before the declaration filed, may be said to have come in the first instance.] Lord *Mansfield* in that case said, "the return of the original writ in trespass, where place is named, or on a præcipe quod reddat where land is demanded, may be the *first instance*; because in those cases the *writ* tells where

(*a*) 5 *Burr.* 2823.

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the cause of action arises: but in debt or detinue it is otherwise; for it is not known where the contract or obligation was made; and therefore till the plaintiff has *counted*, the claims need not to be made." "But if a replevin were sued against the lord of the franchise himself, there the lord's claim would come too late *after* the count; because he must know where the taking was made; and by not demanding his privilege on the writ, he gives the court seisin of the cause; for the lord must use no delay." Now here the university of *Cambridge*, not having conusance, as the university of *Oxford* has, of all personal actions throughout *England* in which any of its members are sued; but their jurisdiction being confined to personal actions arising *within the town of* Cambridge *and its suburbs*; until the plaintiff in the action has declared it cannot be told whether or not the cause of action has arisen within the jurisdiction of the university. The objection therefore is two-fold; either the university might have come in and claimed conusance upon the writ, in which case they were too late; or they ought (which appears to be the weightier objection) to have waited till the plaintiff declared, before which time it cannot be ascertained that they are entitled to claim conusance at all. As with respect to pleas in abatement, it is laid down in 1 *Com. Dig.* Abatement, H. 24. "In a real or personal writ, where no certainty is contained, it is no plea, that there is another action for the same cause, until a plaint or declaration made upon record, which reduces the generality of the writ to a certainty, from whence it may appear to the Court to be the same cause," &c. All the cases but one have been where the claim of conusance was made after declaration or indictment; and *Woodcock* v. *Brooke*(a),

(a) *Cas. temp. Hardw.* 241.

 where

1810.

BROWNE *against* RENOUARD.

where the claim was made upon the writ, was a claim by the univerfity of *Oxford*. And in *Wild* v. *Villets* (*b*), where an action had been brought in the court of the Bifhop of *Ely*, and after declaration there, the caufe was removed into *B. R.*; on which there was an immediate claim of conufance; Lord *Holt* faid, that before fuch claim could be made there muft be a new declaration in this court. [Lord *Ellenborough* C. J. It would ftill come to be afcertained upon affidavit even after the declaration filed; and therefore the plaintiff ought to be prepared to deny that now by affidavit which the V. C. avers in his claim of conufance, and which the defendant verifies by affidavit, that the caufe of action arofe within the jurifdiction. *Bayley* J. It is more advantageous to the parties to have the claim made as early as poffible, becaufe, if well founded, it faves expence to have it fo.] The claim of conufance actually made is contained in the letter addreffed by the V. C. to the Judges of this court; who afterwards direct their officer to record that claim and the warrant of attorney of the perfon making it. It is the fame as if the V. C. himfelf had pleaded the claim in the nature of a plea to the jurifdiction upon the record. If therefore the claim itfelf be informal, it cannot be fupplied by affidavit that the caufe of action arofe within the town and fuburbs of *Cambridge*. And though the claim, as entered on the roll by the officer of the court, ftates, in conformity with the fact fworn in the affidavits, that the caufe of action arofe within the jurifdiction, yet that made no part of the claim itfelf; and if that had been entered as made, the plaintiff might have demurred to it.

(*a*) *Comb.* 319.

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The Attorney General, *Lens* Serjt. and *Dampier*, with respect to the latter objection (the only one which seemed in the first instance to press upon the Court), observed that this was brought forward, as claims of conusance usually are, upon affidavit, as well as by the statement on the record, and therefore it was competent to the Plaintiff to have denied any of the facts stated in those affidavits which were necessary to substantiate the claim. The letter significatory, addressed by the V. C. to the Judges, is not the formal claim of conusance set out on the record, but, as in actions the original writ states the nature of that claim generally which is afterwards detailed in the declaration, so the letter significatory is merely introductory of the claim of conusance which is afterwards stated on the record more formally and in detail from that document, together with the affidavits verifying the material facts of the case in judgment. The record here states the coming into court of the V. C. as deputy of the chancellor, masters, and scholars of the university, by his attorney, to claim and defend the privileges, &c., and then it restates the substance of the letter significatory, together with the proper facts necessary to found the claim of conusance; and amongst others, that the cause of action, if any, arose within the liberties of the university.

The Court expressed themselves entirely satisfied upon this as well as upon the other points, to which answers had already been given by the Lord Chief Justice. And his Lordship further observed, with respect to the objection, that the claim was not preferred in the first instance; that the return of the writ is the first step upon the record, and the interval from that time till some other step be taken on the record may all be deemed a conti-

1810.

BROWNE *against* RENOUARD.

nuing first instance: so that the claim of conusance, having been in fact made before any other step after the return day of the writ was taken upon the record, may be said to have been preferred in the first instance upon the return of the writ: therefore let the claim be allowed.

Thursday, Jan. 25th.

The KING *against* ASHWELL.

A charter giving the right of electing an alderman to the mayor and burgesses at large from themselves, a by-law, stated to be made in 1577 by the then mayor and burgesses, but *not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, viz. the Recorder, aldermen, coroners, common council-men, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town, and called *the livery or clothing burgesses* for the time being, or *so many of them as should be duly assembled together* for that purpose, whereof the mayor to be one, or the major part of them," was held to be a reasonable and valid by-law. But every by-law may be repealed by the same body which made it. And the office of *chamberlain of the town*, as stated in such by-law, was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses.

THIS was an information in nature of quo warranto, calling on the defendant to shew by what authority he used and exercised the office of one of the aldermen of the town of *Nottingham*. To this he pleaded, that the town of *Nottingham* was from time immemorial an ancient town, and that the burgesses thereof, at the time of granting the charter of *Hen. 6.* after mentioned, were immemorially a body corporate, and that during all that time there had been and now were an indefinite number of burgesses of the town. That *Hen. 6.*, by his charter of the 27th year of his reign, confirmed to the burgesses to be a corporation, by name of the mayor and burgesses of the town of *Nottingham*; and that the then *burgesses* of the town and their successors should for ever after have, in the place of two bailiffs of the town, two sheriffs, to be chosen *from themselves*, in the form therein mentioned. He further granted to the said burgesses and their successors, that the same *burgesses* and their heirs might from time to time elect *from themselves* seven aldermen, for life, of whom one to be mayor: and that on the death, depar-

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ture, or amotion of any alderman, the *mayor and burgesses* for the time being should elect one other burgess *from themselves* into the office of alderman; and that the aldermen should be justices of the peace within the same town, &c. It then stated the acceptance of that charter, and that after such acceptance, viz. on the 1st of *May* 1577, the then mayor and burgesses duly made a certain reasonable *by-law, not now extant in writing,* for the avoiding popular confusion and tumult in the election of aldermen, whereby it was ordained, that upon the death, departure, or amotion of any of the aldermen, "the mayor and certain of the burgesses of the said town, viz. the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town, and called *the livery or cloathing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor for the time being to be one, or the major part of them, by themselves, and without the concurrence and assistance of the rest of the burgesses, should for ever thereafter elect one other burgess from the other burgesses of the said town to be one of the aldermen, in the place of the alderman so dying, &c. as to them from time to time seemed fit and convenient:" to which said by-law the mayor and burgesses for the time being, from the time of the making thereof hitherto, have consented and conformed themselves, and the same is now in full force and unrepealed. That since the making of the said by-law, the mayor, recorder, aldermen, the coroner, common councilmen, and such other of the burgesses as had served or did serve the office of chamberlain or sheriff of the said town, and called *the livery or cloathing burgesses* for the time being, or so many of them as were duly assembled together for

1810.

The King *against* Ashwell.

that purpose, whereof the mayor to be one, or the major part of them, have been used and accustomed to elect, and still of right ought to elect an alderman, in the stead of any who hath died, &c.; *without the concurrence or consent of the rest of the burgesses.* The plea then stated, that after the making of that by-law, viz. on the 16th of *Sept.* 1802, the then mayor, certain of the then aldermen, common councilmen, and certain other then burgesses of the town who had served or did then serve the office of sheriff or chamberlain of the said town, and called the livery or cloathing burgesses of the said town of *N.* were in due manner assembled together at the common hall to nominate and elect an alderman of the said town, in the place of *T. C.* an alderman deceased; and so the plea proceeded to state an election of the defendant, being one of the burgesses, by the major part of the persons so assembled, to fill the vacant place of alderman.

The replication took several issues: 1. That the mayor and burgesses of the town did not make such by-law. 2. That the mayor and the other persons named in the defendant's plea were not in due manner assembled in order to elect an alderman in manner and form as in the plea alleged. 3. That the major part of the said mayor, &c. did not elect the defendant. And a suggestion having been entered on the roll, that an impartial trial could not be had by a jury of the town and county, or of the county of *Nottingham*, the venire was awarded into the county of *Leicester*, as next adjoining to the county of *Nottingham*: and a verdict having been found for the defendant on these issues, before *Le Blanc* J. at *Leicester*, a rule was obtained, calling on the defendant to shew cause why judgment of ouster should not be entered against him, notwithstanding such verdict; founded upon an objection that the by-law stated in the defendant's plea was an unreasonable and therefore

therefore an invalid by-law, as taking the right of election of aldermen from the burgesses at large, and confining it to a select body, which did not even require the attendance of the majority of the integral parts of the corporation to constitute the elective assembly.

Lens Serjt., *Balguy*, *Reader*, *Holroyd*, *Scarlett*, and *Balguy* jun. opposed the rule, and maintained the validity of the by-law. The election of an alderman was given by the charter to the mayor and burgesses generally, which is their name of incorporation, without pointing out any specific mode of election; in which case it was long ago settled, in the case of corporations (*a*), followed by other cases (*b*), that the body at large might make a by-law, restraining the number of electors, though not of the eligible; such a by-law being calculated to avoid popular disorder and confusion. The general principle was recognized in *The King* v. *Spencer* (*c*); though there the restraining by-law was held bad, as not having been made by the body at large, but by a select body, which thereby attempted to restrain the rights of the body at large. This by-law, however, is argued to be unreasonable, and therefore bad, because by possibility, it is said, an election of an alderman may be made by the mayor and one burgess; but that consequence might also happen if the right of election were in the body at large; therefore the objection proves too much. And such an extreme case of inconvenience, admitting the greater probability of it, in proportion as the number of electors is reduced, would be felt less than if a large definite number were required to attend, when some by staying away might defeat the election, at least

(*a*) 4 *Rep.* 77. *b.*

(*b*) Vide *Jen. Cent.* 273. *Rex* v. *Tomlyn*, *Rep. temp. Hardw.* 316. and other cases cited in the margin of 3 *Burr.* 1833. *Rex* v. *Spencer*.

(*c*) *Ib.* 1827.

for

1810.

The King against Ashwell.

for a time. In all cafes, however, it muft be prefumed, that the electors will do their duty by giving their attendance; and in cafe of default they may be compelled to do fo by mandamus. The fame thing in effect takes place in moft large bodies, by their own regulations. In the Houfe of Lords 3, and in the Houfe of Commons 40, members are fufficient to conftitute a Houfe for the high function of legiflation. It is the fame in moft other bodies. And the practical convenience of the thing is found to outweigh any theoretical difadvantage. There cannot therefore be any thing intrinfically unreafonable in a by-law made by the body at large, to whom the power of election was originally given, reftraining that power to a certain defcription of themfelves; when the fame thing may in effect be done in each inftance by the voluntary abfence of members. In *Rex* v. *Hoyte*, which was the cafe of a prefcriptive corporation, evidence of an ancient ufage for the election of a capital burgefs by the major part exifting of a definite body, though lefs than the majority of the whole number when complete, was held to be evidence of a charter empowering fuch an election; which could not have been prefumed, if fuch a provifion were in itfelf unreafonable. But if a charter require an election to be made by a definite body, then according to *R.* v. *Bellringer* (a), *R.* v. *Miller* (b) and *R.* v. *Morris* (c), a majority of the entire number muft meet, in order to conftitute an elective affembly: and it is upon a mifapplication of the principle of thofe cafes, that the objection to the by-law in queftion is founded, which only narrows the right of election given originally to an indefinite popular body.

(a) 4 *Term Rep.* 810. (b) 6 *Term Rep.* 268. (c) 4 *Eaft*, 17.

1810.

The KING *against* ASHWELL.

The Attorney-General, Clarke, Dayrell, Dampier, and *Copley,* contrà. It does not follow that a by-law reſtraining the right of electors, as given to them by one charter, may not be unreaſonable and therefore void, becauſe the ſame proviſion may be found in other charters, or may be preſumed to have been originally granted by evidence of ancient uſage in the caſe of a preſcriptive corporation; becauſe the grantees muſt accept or reject the grant in the terms in which the crown chooſes to make it. Here the body at large, by the terms of the charter, had the power of electing their own magiſtrates, and they exerciſed it: then a by-law, which may have been paſſed by a ſmall majority of the exiſting body, abrogating the rights of the reſt, and of their ſucceſſors, and transferring the power of election to a ſelect number, is in the very nature of it unreaſonable, as being deſtructive of the general right granted by the charter. And though the moſt popular rights of election may come to be exerciſed in fact by comparatively ſmall numbers; yet there is a wide difference, whether that happen by the choice of the individuals not attending, or by involuntary excluſion. The unreaſonableneſs of the by-law, therefore, conſiſts in the disfranchiſement, as it may be deemed, of all thoſe who are thus excluded, againſt or without their individual conſent, from the exerciſe of that elective franchiſe which the charter gives them: and this is not compenſated by transferring the privilege from the body at large to a ſelect body, however reaſonable ſuch a confined privilege might have been deemed in the charter itſelf. Then if this reſtriction were not legal in its commencement, no antiquity can give it ſtrength. In *Ginever*'s caſe (*a*),

(*a*) 6 *Term Rep.* 735.

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1810.

The King against Ashwell.

Lord *Kenyon* reserved giving any opinion as to the legality of a by-law to restrain the number of electors; and there, as well as in *Spencer*'s case, all the Court agreed that a corporation could not make a by-law contrary to their constitution.

They also objected that, as in *Spencer*'s case (*a*), it was held that a by-law could not impose another qualification, such as that of having served parish offices, upon the character of corporator, as given generally by the charter, for the purpose of exercising the elective franchise; so here the by-law was bad by requiring, as one of the qualifications for the select body, the having served or serving the office of *chamberlain*; when it did not appear that that was a corporate office, nor did it appear what was meant by "*cloathing* burgesses," or how they were appointed.

Lord Ellenborough C. J. We are called upon to pronounce this by-law to be void, as unreasonable, because it restrains the right of electing aldermen to a select body, which before was possessed and exercised by the body at large; and therefore it is argued, that it affords a greater chance than before of the entire nonattendance of the electors, or at least that there needs only the attendance of the mayor and one other, or perhaps two other burgesses, in order to constitute a good election under it, and that the chance of so small an attendance is greater under the restricted power of election given by the by-law, than under the extended right conferred by the charter. But in order to avoid a by-law upon the ground of its being unreasonable because of some inconvenience that may result from it, it should ap-

(*a*) 3 *Burr.* 1827-8.

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pear to be a *probable* inconvenience: for one can hardly predicate of any law, that some *possible* inconvenience may not result from it: but is it likely to happen? Now this by-law has existed for above 230 years; and during all this time, if any inconvenience had resulted from it, it was competent to the corporation, by the same authority which enacted, to have repealed it. But the long continuance of a by-law, though it would not legalize it if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it: at least the acquiescence of the corporation in it for above two centuries is a fair answer to any theoretical argument of inconvenience; especially when it is considered that they might have relieved themselves from the inconvenience if it existed at all, at any hour of that long period, by repealing the by-law. Then consider what the by-law is: It is a delegation of the right of election by the indefinite body of the corporation at large to a select part of themselves, consisting of such of the burgesses as had served or were serving certain offices, and were called the livery or cloathing burgesses. Such a by-law has the convenience, according to the opinion of the Judges in the case of corporations, of preventing popular tumults, and therefore it was approved of by them. It is not open to the objection which prevailed in *The King* v. *Spencer*, that of imposing on the corporate character of the electors another qualification foreign to it: for though it be said that the office of chamberlain (one of those named in the by-law) does not appear to be a corporate office; yet being described to be an office *of the town*, the burgesses of which were incorporated, and classed with the office of sheriff, as an office in the appointment of the corporation, and the chamberlain being one of those called "the livery or cloathing

1810.

The King *against* Ashwell.

cloathing burgesses," it must be understood to be a corporate office. I therefore see no ground for impeaching this by-law, either as unreasonable on account of any probable inconvenience likely to result from it, or as imposing any foreign qualification on the corporate character. At the same time I do not say that any thing which may be done by charter may be done by a by-law: but with respect to elective functions to be performed by the body at large, they may in this manner delegate them to a select part of themselves; and I cannot say that it is an unreasonable by-law because an inconvenience may by bare possibility result from it.

Grose J. This is in effect a motion in arrest of judgment, founded upon the supposed illegality of the by-law under which the defendant claims title to his office. It is plain that the prosecutor did not in the first instance consider the by-law to be illegal, otherwise he would have demurred to it: but now he insists that it is unreasonable on account of the greater chance that only two or three of the electors may attend an election. But if any inconvenience were likely to arise from this, it is strange that the by-law should have existed so long without objection; and I can see nothing more unreasonable in this by-law than would exist in every other case where the number of electors is narrowed: but it has been settled since the case of corporations that a by-law made for that purpose is valid; the reason assigned for which is in order to prevent popular confusion and tumults in elections, and an excellent reason it is. Finding therefore nothing unreasonable in this by-law, I agree that the rule ought to be discharged.

Le Blanc

1810.

The KING against ASHWELL.

Le Blanc J. This rule for entering judgment of ouster against the defendant, notwithstanding the verdict found for him on the issues taken on his plea, was moved for on an alleged defect of his title as set forth in the plea; and two objections have been taken to it; first, that he ought to have shewn the manner in which certain officers, and particularly the chamberlain mentioned in the by-law, were appointed, that they might all appear to be corporate officers; and secondly, that the by-law itself is essentially unreasonable and therefore illegal. As to the first objection, it appears that all the officers named in the by-law were known officers of the corporation at the time; they are mentioned as officers of the town who were called "*the livery or cloathing burgesses;*" which sufficiently shews them to be *burgesses*, who are incorporated by the charter. Then as to the second objection, as to the unreasonableness of such a by-law; it has been settled since the case of corporations, confirmed by other cases, that it is competent for the body at large, to whom the power of making by-laws is given, to narrow the number of the body who are to elect, and to delegate the power of election to a certain number of the corporation; as here, to a certain description of known officers of the corporation and such other burgesses as have filled the same offices. But it is said to be unreasonable, for inasmuch as a majority of the persons so designated are not required to attend in order to make an elective assembly, it may happen, it is said, that one or two burgesses, with the mayor, may elect an alderman. But in order to be *duly* assembled, as the by-law requires them to be, the persons who are to make the election must have *notice* of the meeting; and if, after notice, they do not chuse to attend, it is only the same inconvenience which might happen

1810.

The King against Atwell.

happen in case of an election to be made by the body at large. And their chusing to absent themselves no more shews the by-law to be unreasonable, than if, attending at the place of election, they did not chuse to vote. It is not necessary to maintain that the same provision must be reasonable and valid in a by-law which would be good by charter or prescription; but it is sufficient to say that it is no more unreasonable to provide that a particular number of the whole body should on being duly assembled for the purpose make the election, than that the whole number should elect. Therefore I consider this to be a reasonable and valid by-law.

Bayley J. The crown by its charter may impose what terms it pleases, and if the parties accept the charter, no objection can be made on the ground that those terms are unreasonable: but where the question is upon a by-law, it is open to object to whatever is unreasonable in it. But I see nothing unreasonable in this by-law: it does not give the right of election to those who had no right before: it does not dispense with the attendance of any persons whom the charter expresly requires to attend: but merely to avoid popular confusion the corporation made a by-law that the election of aldermen should be made by a certain description of their own body. And this by-law only operates upon the body at large so long as they think fit to continue it: it is liable to be re-considered by them at all times: it only binds their successors so long as the successors chuse to be bound by it: for the same body that made the by-law may repeal it. Then the circumstance that for nearly 240 years no inconvenience has been found to result from it is a strong argument to shew that no inconvenience is likely to result

 from

1810.

The KING *against* ASHWELL.

from it; and therefore to shew that it is not unreasonable. Next, as to the objection that the chamberlain is not shewn to be a corporate officer; the whole town being incorporated, how can there be such an officer of the town, unless he be a corporate officer? It does not appear therefore that any person is named in the by-law who is not a corporate officer.

Rule discharged.

ROBERTS *against* WILLIAMS, Clerk, and Another.

Friday, Jan. 26th.

Prohibition denied to the spiritual court upon its rejection of a modus set up there of 1*d.* for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkeys, at the option of the vicar; such modus not ascertaining any certain time when the money payment in lieu of the eggs was to be made, in case the option were made to take it in money.

W. *Williams*, clerk, vicar of the parish church of *Pendoylon* in the county of *Glamorgan*, and his lessee of the tithe, libelled *R. Roberts*, an occupier in that parish, in the consistory court of the diocese of *Landaff*, for subtraction or non-payment of vicarial tithes; amongst others, the tithe of 40 turkies bred and reared on *Roberts*'s farm in 1808, which sold at the rate of 7*s.* 6*d.* a couple, the tithe whereof amounted in value to 15*s.* To which *Roberts* pleaded, that by an ancient custom or modus decimandi, used from time immemorial within the parish of *Pendoylon*, the vicar was never entitled to the tithe of turkies in kind from any of the inhabitants, but *to* 1*d. for every turkey laying eggs, or to every tenth egg laid by such turkey, at the option of the vicar in lieu thereof.* This plea, with the proof offered in support of it, having been rejected by the spiritual court, an application was made in the last term on behalf of *Roberts*, and a rule obtained, calling on Mr. *Williams* and his lessee to shew cause why a writ of prohibition should not issue to prohibit the consistory court of *Landaff* from holding further plea of the matters there depending between these parties.

 Bevan

1810.

Roberts *against* Williams.

Bevan shewed cause against the prohibition, and made three objections to the modus; 1st, that attending to the relative value of money in the time of *Rich.* 1st, at which time the modus must have existed, if at all, 1*d.* for every turkey laying eggs was a rank modus. [But *The Court* said they could not now go into that objection (*a*).] 2dly, That there could be no modus of the tithe of *turkies*, per se, because turkies were only introduced into this country since the time of legal memory. [Lord *Ellenborough* C. J. How are we to know that?] The Court has taken notice that hops were introduced within time of memory; as it was said, about the time of Queen *Elizabeth* (*b*). Turkies were first noticed in this island in 1555 (*c*); and the first mention of them in our books is in *Hugton* v. *Prince* (*d*) in the 37 & 38 of *Eliz.*, where they are said not to be titheable in themselves or their eggs, because they were feræ naturæ. And in *Brinklow* v. *Edmunds* (*e*), where a modus of three eggs for every cock and drake, and for every hen and duck respectively, payable on *Wednesday* before *Easter*, in lieu of tithe of eggs and of chickens and ducks hatched in the parish, was established, the reporter, who was a person of great experience on those subjects, adds in a marginal note—" not to extend to turkies, because brought

(*a*) By Lord *Eldon* C. in *O'Connor* v. *Cook*, 6 *Ves. jun* 671. " the magnitude of the payment is but evidence of the improbability that it was immemorially paid." It is therefore properly a question of fact, involving the relative value of money and of the particular species of property to which the modus is applied, as they might by possibility have existed before time of memory. But where the rankness, as it is called, is so gross and palpable as to exceed all moral possibility, courts of equity have in many instances decreed against them, without sending the question to a jury. *Vide* instances of rank moduses collected in *Toller on Tithes*, 207.

(*b*) *Crouch* v. *Risden*, 1 *Ventr.* 61. 1 *Sid.* 443. and 2 *Keb.* 612.

(*c*) *Dugd. Orig.* 135. (*d*) *Moor*, 599. (*e*) *Bunb.* 308: *anno* 1731.

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into *England* lately." But in *Carleton* v. *Brightwell* (*a*), the Master of the Rolls said he could not see but that turkies were as tame as other poultry, and must therefore pay tithes: but that if tithes were once paid of the eggs, there could be no second demand for the chickens hatched. 3dly, The modus is bad, inasmuch as there is no time certain mentioned when it is to be paid. *Goddard* v. *Keeble* (*b*), *Phillips* v. *Symes* (*c*), and *Blacket* v. *Finney* (*d*), are in point: and the Court will not send a case to trial in vain. In *Hill* v. *Vaux* (*e*), where the modus set up was bad on the face of it, the Court refused a prohibition.

Peake, in support of the prohibition, as to the second objection, said that it was founded on an assumption of fact, which the Court would require proof of, before they decided against the validity of the modus. [Lord *Ellenborough* C. J. said that there might be a good modus, to include turkies, though the bird might have been introduced into this country within time of legal memory; as if there were a modus for all domestic fowls: but here, he observed, the modus was distinctly and eo nomine for turkies.] If there were a general modus for all domestic fowls, including turkies, the party might insist on it as a modus for turkies nominatim: but even as a particular modus, the Court would grant the prohibition, in order to try the fact on which the modus is objected to. For it is strange that the Court should have taken notice, as it is supposed, that hops were first introduced in the time of Queen *Elizabeth*, when there was a petition to parlia-

(*a*) 2 *P. Wms.* 462 *anno* 1728.
(*b*) *Bunb.* 105. and *vide* other cases cited in the note to the 2d edit.
(*c*) *Ib* 171. (*d*) *Ib.* 198. (*e*) 1 *Ld. Ray* 358. and *Salk.* 656.

1810.

ROBERTS *against* WILLIAMS.

ment in the 6 *H.* 6. againſt the uſe of them. It is diſputed between naturaliſts whether the turkey firſt came from *Aſia* or *America*, but that does not decide the time of its introduction into *England*; but being found here in a domeſtic ſtate, it may be preſumed, in the abſence of all proof to the contrary, that it was here before time of memory: and the opinion of Sir *Joſ. Jekyll* in *Carleton* v. *Brightwell* is an anſwer to the caſe in *Moor*, and the note in *Bunbury*. As to the 3d objection (which came upon him by ſurpriſe), he ſuggeſted that the caſes in *Bunbury* requiring a certain time for the payment of a modus had been over-ruled in ſome later caſe: but at any rate he contended, that the time of payment of this modus was certain enough, namely, as ſoon as the tenth egg was laid; and then the parſon had his option either to take that, if he had not thought proper to take the 1*d.* before for every turkey laying eggs. And *Watſ. Clerg. L.* 563. (*a*) ſays, that of the tithe of fowls (including turkies) either the tenth egg or the tenth young is to be paid, but not both; and cuſtom regulates which: and the only difference in this modus is, that it gives the option to the parſon either of the egg or of money.

Lord ELLENBOROUGH C. J. This modus, it is ſaid, gives the vicar an option either to take the tithe in the egg or in money in lieu thereof: but though, if the tithe be taken in the egg it would belong to the vicar at the time the tenth egg was laid, yet no certain time is given if the option be made to take it in money; and therefore if there were a change of vicars in the year, it would be uncertain to which of them it would belong: it is moſt material therefore for the vicar to have the time aſcer-

(*a*) 3d edit.

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tained when the money payment is due, if the option be made to take it in money: and the defect in not ascertaining that time seems to be the vice of this modus.

The rest of the Court agreed with his Lordship on this ground to discharge the rule for the prohibition.

On the same day *Peake*, having looked into the cases on the last point, referred to *Richards* v. *Evans* (*a*), where Lord *Hardwicke* C. said, that as to the general question, whether it were necessary to lay and prove a particular day of payment, the case in the Exchequer (*b*) was certainly so determined; but he remembered that it gave general dissatisfaction in *Westminster-hall* and abroad, as too nice to require the proof of a particular day: that it had been since adjudged to the contrary, that *on or about* was sufficient: so that they had left off taking that exception in the Exchequer. But

Lord ELLENBOROUGH C. J. observed, that Lord *Hardwicke* himself assumed in that case that it was necessary there should be some fixed time of payment, though in pleading it was not necessary to lay the precise day; but that laying it to be *on or about* such a day was sufficient. But that without some fixed time, it could not be known to which of two vicars, in case of a change, the money payment would belong.

Per Curiam, Rule discharged.

(*a*) 1 *Ves* 39.

(*b*) This was before cited in the book as a case in *Tr.* 5 *Geo.* 1. and *vide* what was said by Lord *Hardwicke* to the same effect in *Cart* v. *Ball*, 2 *Vef.* 3.

1810.

Friday,
Jan. 26th.

The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was ftill liable upon the bill in default of the acceptor, three months after it was due, faid that *he knew he was liable, and, if the acceptor did not pay it, he would*: Held that he was bound by fuch promife.

STEVENS *againft* LYNCH.

THIS was an action by the indorfer of a bill of exchange againft the drawer. The defendant drew the bill upon *Jones* in favour of *Cleveland*, who indorfed it to the plaintiff. *Jones* accepted the bill. The defence fet up at the trial before Lord *Ellenborough* C. J. in *London*, was that the plaintiff had twice given time to the acceptor, after his difhonour of the bill, by which the drawer was difcharged. The anfwer given to this was, that three months after the bill was due, and after the indulgence, which was in fact known to the defendant (he having before told *Jones* that he was glad time had been given to him), the defendant promifed to pay the bill; faying to the plaintiff, "I know I am liable, and if *Jones* does not pay it, I will." On this fubfequent promife, his Lordfhip held that the plaintiff was entitled to recover; and accordingly he took a verdict for the amount of the bill.

The Attorney-General moved for a new trial, on the ground that the defendant had made the promife under a miftaken belief that he was ftill liable, and therefore ought not to be bound by it. He referred to *Chatfield* v. *Paxton* (*a*), in which cafe he had contended on the part of the defendant, that the money having been paid with a general knowledge of the facts, the party paying it un-

(*a*) *M.* 39 *Geo.* 3. *B. R.* Vide *Chitty on Bills of Exchange*, 102. and the note referred to in *Bilbie* v. *Lumley*, 2 *Eaft*, 471. where money paid by one with full knowledge, or the means of fuch knowledge in his power at the time, of all the circumftances, cannot be recovered back, on account of fuch payment having been made under an ignorance of the law.

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1810.

STEVENS *against* LYNCH.

der a false impression of the law could not avail himself of that ignorance to avoid his payment and recover back the money: the plaintiff, however, recovered and maintained his verdict in that case. And he also referred to *Bize* v. *Dickason and Another* (*b*), where the Plaintiff recovered back money which he had paid to the defendants, the assignees of a bankrupt, under a mistake, without deducting money which he was entitled to set off against the debt due to the bankrupt's estate.

The Court, however, considered those cases to have proceeded on the mistake of the person paying the money, under an ignorance or misconception of the facts of the case; but here the defendant had made the promise, with a full knowledge of the circumstances, three months after the bill had been dishonoured, and could not now defend himself upon the ground of his ignorance of the law when he made the promise.

Rule refused.

(*a*) 1 *Term Rep.* 285, 7.

ROE, on the Demise of RAPER, *against* LONSDALE.

Friday, Jan. 26th.

Copyhold descending by custom to all the children equally of the tenant last seised, one of the joint tenants may maintain ejectment on his single demise for his own share.

THIS ejectment was brought, on the single demise of the heir at common law, to recover a copyhold estate in the county of *York*; but, it appearing at the trial before *Chambre* J., that the custom was for the lands to descend, on the death of the tenant last seised, to all the sons and daughters equally, of whom there were several in the present instance, the plaintiff was nonsuited for want f a joint demise.

1810.

ROE, on the Demise of RAPER, against LONSDALE.

Hullock (with whom was *Walton*) moved in the last term to set aside the nonsuit, and for a new trial; contending that the lessor's demise was a severance of the joint tenancy; and that he might recover his part; as one of several parceners might recover her part in ejectment, without the others joining. And he cited *Doe* d. *Gill and his Wife* v. *Pearson* (a), where that was recognized.

Topping, for the defendant, now admitted that he could not sustain the objection; the learned judge who tried the cause being himself satisfied that the lessor of the plaintiff was entitled to recover his customary share. And the rule was accordingly made absolute (b).

(a) 6 *East*, 173.
(b) Vide *Denne* v. *Judge*, 11 *East*, 288. and *Doe* v. *Read*, post.

Saturday, Jan. 27th.

The KING *against* The Churchwardens and Overseers of the Poor of the Parish of SCULCOATES, in the East Riding of the County of YORK.

Commissioners under the *Beverley* and *Barmston* drainage act, who purchased land and erected buildings in the parish of *Sculcoates* for the outlet of the drainage, but who received no benefit from such property in *Sculcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet, are not rateable in *Sculcoates* for such benefit.

THE parish officers of *Sculcoates*, in the rate made for the relief of their poor, charged the commissioners of the *Beverley* and *Barmston* drainage in a certain sum in respect of certain lands and buildings in that parish, purchased by them and converted into a drain, under the act of parliament after mentioned, which land was cut for the purpose of the drainage, and is now covered with water, containing 6 acres. The commissioners appealed to the sessions against the rate, on the grounds, 1st, That

 they

1810.

The KING against The Churchwardens and Overseers, &c. of SCULCOATES.

they were not the proprietors of any rateable property within the parish of *Sculcoates*; and 2dly, That they derived no beneficial interest from the lands for which they were rated: and the Sessions quashed the rate, subject to the opinion of this Court upon the following case.

By an act of the 38 *G.* 3. *c.* 63. intituled " An act for " draining, preserving, and improving, the low grounds " and carrs, lying in the several parishes, lordships, town- " ships, hamlets, precincts, and territories, of *Beverley* " *Saint John of Beverley*, *Grevehill*, *Sandholme*, &c. " (naming nearly 40 other districts, amongst which *Scul-* " *coates* is not one), all in the East Riding of the county of " *York*," certain commissioners are appointed for putting the act into execution. These commissioners, for the purposes of the act, purchased the lands and buildings then rated in *Sculcoates*, which lands and buildings have been converted by virtue of the act into part of a drain extending from *Beverley* through part of *Sculcoates*, a distance of 10 miles; *but no part of the lands adjoining thereto are benefited thereby*; the drain having been made for the passage of waters coming from certain low grounds intended by the act to be drained into an outfall clough into the river *Hull*. The lands and buildings so purchased by the commissioners to be applied as aforesaid were, previous to such purchase, assessed to the relief of the poor and other parochial rates and assessments in common with other lands in the parish of *Sculcoates*, but since the making of the drain the lands so cut or excavated have not been rated. The drainage is in every respect completed, and the proprietors of the low grounds situate within the several parishes mentioned in the act have received the benefit thereof.

Park

1810.

The King *against* The Church-wardens and Overseers, &c. of Sculcoates.

Park contended that the commissioners, having a mere naked trust, without any beneficial interest, were not rateable in respect of this property: and for this he relied on the case of the Salters' Load Sluice Navigation (*a*), which was distinguished from all the prior cases where tolls levied for the benefit of the proprietors had been held to be rateable. He then referred to several clauses of the act in question. By *s.* 2. the lands to be drained are to be taken out of the jurisdiction of the general commissioners of sewers and placed under these commissioners. By *s.* 4. persons are to be chosen commissioners who have *no interest* in the lands to be drained; and by *s.* 8. they are to receive two guineas a day for their trouble, journies, and expences in the execution of the act; and they have no other benefit whatever from the drainage; but all the money raised by them is by *s.* 51. to be applied to the purposes of the act: and by *s.* 60. they are to raise a rate on the owners of the lands benefited by the drainage for the support of the same.

Topping and *Holroyd*, contrà, insisted that the commissioners were rateable. They are in the actual occupation of the property. By *s.* 38. the estates are to be conveyed to them and their heirs; and *s.* 39. says that they and their heirs "shall be deemed in law to be in the actual seisin and possession thereof to all intents and purposes whatsoever," &c. *S.* 44. directs every lessee or tenant, in possession of lands purchased by them for the purposes of the act, to deliver up the possession thereof to the commissioners; and by *s.* 98. they are to bring actions of trespass and ejectment. There is nothing in the act to exempt the property, which was before rated, from being

(*a*) 4 *Term Rep.* 730.

still

1810.

The KING *against* The Church-wardens and Overseers, &c. of SCULCOATES.

still rated in their hands. The property itself is beneficial to the owners of the lands which are drained, and they would certainly be rateable, like proprietors of canals and other beneficial undertakings of the like description, if they occupied it by themselves or their servants; and an occupation by their trustees is the same in effect. The commissioners of the Salters' Load Sluice navigation were held not to be rateable, because they were trustees merely for public purposes. [Lord *Ellenborough* C. J. I have been looking, without success, into the act to see if these commissioners are either in the receipt of any fund for their own benefit, or are trustees of any divisible fund in their hands in this parish for the benefit of others. They certainly are not so for their own benefit. Then can you point out any benefit to be received by any persons, except by the owners of the lands benefitted by the drainage in other parishes, and who are liable to be rated in their respective parishes for the improved value of their lands there? *Bayley* J. Is there any beneficial interest derived in this parish from these works? for this is a parish rate.] It is not material from whence the benefit or profit is derived, whether in or out of the parish, if it be received in the parish: and here the benefit to the land owners in the parishes above is derived to them from the property and works situated in *Sculcoates* parish: the commissioners, therefore, who represent those land-owners ought to be rated there for the benefit which they derive from the appropriation of the property in *Sculcoates* to their use: and no injustice will be done to those owners; for this will form an item of charge against the increased annual profits of the lands, which they will be entitled to deduct from those increased profits in the respective

1810.

The KING
against
The Church-
wardens, and
Overseers, &c.
of
SCULCOATES.

ſpective parochial rates. In *Rex* v. *Gardner* (a), a collegiate body was held liable to be rated for property occupied by them for their own benefit. Lord *Mansfield* there ſaid that all real property was rateable to the poor, and muſt have (except in certain caſes there mentioned, *i. e.* of lands held in truſt for the poor, or for public purpoſes,) occupiers and inhabitants in conſideration of tax. So the corporation of *Aberavon* (b), who were ſeiſed in fee of unincloſed land ſtocked with the cattle of the reſident burgeſſes and others; and the dock company of *Hull* (c), who purchaſed land and erected docks, under an act of parliament for the improvement of the port, yielding profit to the individuals whoſe capital was ſubſcribed; were held liable to be rated for the real property ſo applied.

Lord ELLENBOROUGH C. J. In all theſe caſes the property rated yielded pecuniary benefit, or that which was capable of being eſtimated and converted into pecuniary benefit within the pariſh to the parties intereſted: but here the benefit reſults to the lands drained which lie in other pariſhes, where the owners are liable to be rated in proportion to their improved value: and the property would be liable to a double rate if it were alſo rateable in the hands of the commiſſioners. Or ſuppoſing that the objection of double taxation were obviated by the argument that the amount of the rate on theſe commiſſioners ſhould be deducted, pro tanto, from the ſeveral parochial aſſeſſments on the increaſed value of the lands in the hands of the owners, ſtill the difficulty remains of ſhewing that there is any benefit received by theſe com-

(a) *Cowp.* 79. (b) 5 *Eaſt*, 453. (c) 1 *Term Rep.* 219.

miſſioners

missioners for themselves or others within this parish, which is capable of being rated. The benefit is all derived in other parishes. The dock-company of *Hull* were in the receipt of tolls for the benefit of the share-holders in respect of the use of the docks within the parish in which they were rated; but these commissioners gather no profits either for themselves or others in this parish, but are the mere instruments of benefit to land-owners elsewhere. I know of no instance where a canal company has been held rateable for the mere space occupied by the canal in a particular parish, if no tolls were received or become due there; and I cannot distinguish between land converted into a drainage and into a canal. However, that our decision may not clash with other cases, we will look into them before we deliver our final opinion.

The case of the proprietors of the *Staffordshire* and *Worcestershire* canal navigation (*a*) was referred to by *Park*, as having decided that the company were only rateable for their tolls in the several parishes where they became due, and not in those through which the canal merely passed; the canal not being productive property in the latter. And after the discussion and decision of the *Tynemouth* case, which stood next in the paper, on this day,

Lord ELLENBOROUGH C. J. said, that the Court having no doubt in this case, they would dispose of it at once, by stating that they were clearly of opinion, that the commissioners, having no beneficial occupation of the property in this parish, either for themselves or others,

(*a*) 1 *Term Rep.* 348-9.

were

1810.

The KING against The Church-wardens and Overseers, &c. of SCULCOATES.

were not liable to be rated for it. That if they were to hold otherwise, it would be opening a question of beneficial occupation in every case where a canal or a turnpike road passes through a parish, though the tolls were not due there; which had never been considered as liable to be rated in such parishes, but only where the benefit accrued. In conformity, therefore, with all the decisions on the subject, the commissioners, having no beneficial occupation within the parish, were not liable to be rated there.

Order of Sessions, quashing the Rate, confirmed.

Saturday, Jan. 27th.

The KING against The Inhabitants of TYNEMOUTH.

The tolls of a lighthouse situated in the township of *Tynemouth*, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable quà tolls in the township. And the residence in such lighthouse by one as servant to the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the toll-house.

UPON an appeal of *Wm. Fowke* Esq. to the Quarter-Sessions of the county of *Northumberland* against a certain rate for the relief of the poor of the township of *Tynemouth* in that county, the Sessions ordered the rate to be amended by striking out Mr. *Fowke*'s name, and that of *R. Wisencroft* (his servant); subject to the opinion of this Court upon the questions; 1st, Whether *R. Wisencroft* be rateable for two rooms in *Tynemouth* lighthouse; and 2d, Whether Mr. *Fowke* be rateable for the tolls in respect of the lighthouse? The facts were these. Mr. *Fowke* is entitled to *Tynemouth* lighthouse, and to certain tolls payable in respect thereof, by virtue of letters patent under the great seal in the 17 *Car.* 2. viz. 12*d.* for every ship belonging to any of the king's subjects passing by the lighthouse, and belonging or trading to the ports of *New-castle* and *Sunderland*, or either of them, or the creeks or members of the same; and 3*s.* for every ship belonging to any foreigner or stranger coming or passing by the light-

1810.

The KING *against* The Inhabitants of TYNEMOUTH.

lighthouſe. Mr. *Fowke* is alſo entitled to additional light duties under an act of the 42 *Geo.* 3. intitled, "an act for improving the *Tynemouth-caſtle* lighthouſe, and for authorizing additional light duties in reſpect of ſuch improvement." The alterations in the lighthouſe have been made in conformity to the act. The lighthouſe is in the townſhip of *Tynemouth*; and the tolls and duties ariſing to Mr. *Fowke* are payable upon ſhips ſailing in the *German* ocean and receiving the benefit thereof: and the ſhips from which the tolls or duties ariſe never come within the townſhip of *Tynemouth*, but proceed directly from the main ſea into the river *Tyne*, the whole of which as far as *Newcaſtle* is in the port of *Newcaſtle-upon-Tyne*, and the pariſh of *St. Nicholas* within the town and county of the town of *Newcaſtle-upon-Tyne*: and neither Mr. *Fowke*, nor any of the receivers of the tolls or duties reſide in the townſhip of *Tynemouth*. The tolls or duties paid in reſpect of ſhips arriving at and ſailing from the port of *Newcaſtle-upon-Tyne* are collected at the cuſtom-houſe in the pariſh of *All Saints* in the town and county of *Newcaſtle-upon-Tyne*, by Mr. *Thomas Beck*, a perſon appointed by Mr. *Fowke* for that purpoſe: and the tolls or duties paid in reſpect of ſhips ſailing from other coaſting ports are collected at the ports from whence they ſail, if they clear at the cuſtom-houſe there to a port beyond *Tynemouth-caſtle* light; if to a port ſhort of *Tynemouth*, no toll or duty is payable by them in the firſt inſtance: but if they afterwards extend their voyage or paſſage to *Newcaſtle* or beyond the lighthouſe, then the toll or duty is paid at the port of their arrival. Some of the tolls collected at the coaſting ports are remitted to Mr. *Beck* at *Newcaſtle*, and others accounted for in the firſt inſtance to Mr. *Fowke*. The townſhip of *Tynemouth* is within the

1810.

The KING
against
The Inhabitants
of
TYNEMOUTH.

parifh of *Tynemouth*, and maintains its own poor. *Wifencroft* is a fervant of Mr. *Fowke*, at an annual falary, and refides in two rooms within the walls of the lighthoufe, to take care of the light: and he is rated for thofe two rooms, as occupier, at 6*l.*; and Mr. *Fowke* is rated for the tolls, in refpect of the lighthoufe, at 750*l.* The property-tax in refpect of the tolls has been paid to the collectors of that tax in the townfhip of *Tynemouth*.

Topping and *Hullock*, on the part of Mr. *Fowke* and his fervant, maintained that at any rate the fervant could not be rated; his occupation being in law the occupation of his mafter: and they referred to a late cafe of the *Whitehaven* bank, argued in the Exchequer-chamber, before all the judges. They alfo refifted the liability of Mr. *Fowke* himfelf to be rated for this property within the townfhip of *Tynemouth*, inafmuch as the fhips from which the tolls were collected never came within the townfhip, nor were the tolls received there: for which they cited *The King* v. *Rebowe* (*a*), as directly in point.

Holroyd and *Bigge*, contrà, admitted that the cafe was not diftinguifhable from *The King* v. *Rebowe*; but they faid that that cafe was decided before the rateability of tolls in general had been fettled. In the argument of *Atkins* v. *Davis* (*b*), it is faid to have been fo decided, upon the principle, that the profits were uncertain, and depended upon the expenditures: but that queftion having been fince put at reft, the authority of that cafe is much impeached. Confidering the cafe then upon principle, the lighthoufe in refpect of which the tolls arife is in the townfhip: it confers a great benefit to the fhips navi-

(*a*) *M.* 12 *G.* 3. 1 *Conft.* 115. 3d edit. (*b*) *Cald.* 351.

gating

gating along that coaſt, and the tolls are payable for that benefit; the tolls therefore are properly due there where the benefit ariſes, though for convenience ſake they may be collected in the different ports where the ſhips arrive. Suppoſing a towing poſt were neceſſary to be placed at the mouth of a river to warp in the ſhips; though the body of the river where the ſhips lay were in another pariſh, yet the tolls would be payable in the pariſh where the poſt was fixed. [*Bayley* J. obſerved that the rate in ſuch a caſe would be upon the poſt.]

Lord ELLENBOROUGH C. J. It is no queſtion now whether this property could be rated in ſome other way; as if the lighthouſe, whoſe light is the meritorious cauſe of earning the tolls, were in conſequence let at a larger rent: but this is a rate ſpecially upon the tolls, and therefore the caſe is not diſtinguiſhable from *The King* v. *Rebowe*, which is ſo immediately in ſpecie and in all its circumſtances the ſame, and has been ſo long conſidered and acted upon as law, that it concludes the queſtion. What local property is there within the townſhip on which this rate on the tolls can be levied? The tolls are not received there; nor do the ſhips from which they are collected come within the townſhip; the ſubject matter of the rate has no locality within this townſhip. As to the other point, it is equally clear that it is the occupation of the maſter by his ſervant, and not the occupation of the ſervant himſelf: and therefore the rate on the ſervant is bad on that ground.

Per Curiam, Order of Seſſions, amending the Rate, confirmed (*a*).

(*a*) Vide *poſt*, *Rex* v. *Eyre*.

1810.

Saturday, Jan. 27th.

Upon an appeal to the Sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases.

The KING *against* KNILL.

THE defendant appealed to the sessions in the county of *Hereford* against an order of filiation of a bastard child, and gave due notice of such his appeal to the parish officers of *Holm Lacey*, on whose application the order had been obtained. The Sessions confirmed the order, subject to the opinion of this Court upon a case, which stated, that when the appeal came on to be tried, the appellant was called upon to begin, and to allege and prove what he could against the order; which he refused to do; insisting that by the rules of law the respondents were bound in the first place to begin and support the order. The respondents refused to do so; insisting that according to the practice of that sessions it was incumbent upon the appellant to begin, by alleging and proving a sufficient case for quashing the order. The Sessions found this latter to be their practice in the like cases; and therefore required the appellant to begin by shewing cause against the order complained of, and proving what he could to invalidate it. And no cause being shewn, nor anything alleged or proved on either side, as to the merits, for or against the original order of filiation, the Sessions confirmed the same. And now the original order and order of confirmation being removed into this Court by certiorari, and a rule obtained calling on the prosecutors to shew cause why they should not be quashed for insufficiency;

Gaselee, who was to have shewn cause, admitted that he could not support them; the case of *The King* v. *Newbury*,

1810.

The KING *against* KNILL.

bury (*a*), having fettled the point; and it being the general practice of Seffions throughout the kingdom for the refpondents to begin by fupporting their order.

And *The Court*, being of this opinion, remitted the caufe to the Seffions to proceed upon and hear the appeal in the regular and general courfe.

Conft and *Puller* were for the appellant.

(*a*) 4 *Term Rep* 475.

The KING *againft* The Inhabitants of HARDHORN with NEWTON.

Saturday, *Jan.* 27th.

Where the mafter died 3 weeks after hiring the pauper for a year, the latter, abiding in the fervice with the widow and fons to the end of the year, gains a fettlement in the parifh where fhe ferved. And it is no lefs an abiding in the fervice for a year, becaufe one of the fons, on the frivolous pretence that the fervant threw more fand on the floor than he deemed neceffary, turned her out of doors 3 weeks before the end of the year; fhe being willing and offering to ftay to the end of the year, but carrying away her cloaths the next day, and taking what the fon infifted was her full wages for the year according to the agreement, though fhe demanded a larger fum as her full wages.

MARGARET Lingard, a pauper, was removed by an order of two juftices from the townfhip of *Newton* with *Seales* to the townfhip of *Hardhorn* with *Newton*, in the county of *Lancafter*. Upon appeal to the Seffions againft this order, the queftion was, Whether a fettlement had been gained by hiring and fervice in *Hardhorn* with *Newton*. The pauper was hired by *R. Gratrix* in *Hardhorn*, for a year: three weeks after the beginning of the year *Gratrix*, the pauper's mafter, died, and the farm was continued on by his widow and two fons, *George* and *William*. About three weeks before the end of the year the pauper fell out with *George*, one of the fons, about her work, becaufe fhe threw more fand upon the floor than he deemed neceffary, and was by him turned out of doors, though fhe was willing to ftay. The next day fhe

 came

1810.

The King *against* The Inhabitants of Hardhorn with Newton.

came again for her cloaths, when *George* paid her 4*l.* 10*s.* as for her full wages. There was a dispute about the amount of her wages; *George* insisting that the pauper was hired for 4*l.* 10*s.*, and she demanding 5*l.* 15*s.* The pauper, however, accepted 4*l.* 10*s.*, and never got any thing more, though she employed an attorney for that purpose. The pauper, when she came the next day for her clothes, offered to stay to the end of the year, but *George* would not let her. The Sessions, being of opinion that a settlement was gained under the hiring and service above stated, confirmed the order.

Scarlett, in support of the order, said that he did not know whether the death of the master within three weeks after the hiring were meant to be urged as a dissolution of the contract, notwithstanding the continuance of the service under the original hiring with the widow and sons on the farm. [But *Le Blanc* J. said there could be no question made as to that: and the counsel for the appellants said that he did not mean to raise any objection on that ground, but upon the subsequent dissolution of the contract by the acts of the parties.] *Scarlett* then observed that the cases which turned on the question of dispensation of the service, or of dissolution of the contract, ran very near to each other; but that which came nearest to the present, *Rex* v. *St. Philip* in *Birmingham* (*a*), classed this with the cases of dispensation. The pauper was unjustly discharged before the end of the year; and though she took her wages, yet they were the wages for the whole year, and she *offered* to stay and serve out her time. And that offer distinguished the case from *Rex* v. *Claybydon* (*b*), where it was only stated that the servant wished

(*a*) 2 *Term Rep.* 624. (*b*) 4 *Term Rep.* 100.

1810.

The KING *against* The Inhabitants of HARDBORN with NEWTON.

to ſtay out the year; ſuch wiſh not having been communicated to the maſter. [Lord *Ellenborough* C. J. having obſerved that the queſtion here really was, whether kicking the pauper out of doors was a diſſolution of the contract, the reſpondents' counſel ſaid it was unneceſſary to argue the caſe any further.]

J. Williams, contrà, admitted that the contract could only be diſſolved by the conſent of both parties; but contended that the acceptance of the wages by the pauper before the end of the year ſhewed ſuch conſent on her part, though ſhe would have preferred ſtaying out the whole year. The act of parliament (*a*) requires "a continuing and abiding in the ſervice during the ſpace of one whole year," in order to confer a ſettlement, and every caſe of diſpenſation is againſt the plain ſenſe and letter of the act: the Court therefore will not be inclined to go an iota farther than the expreſs adjudications compel them to go; and where there are conflicting authorities will rather abide by the letter of the ſtatute. He then referred to *Rex* v. *Grantham* (*b*), *Rex* v. *Thiſtleton* (*c*), *Rex* v. *King's Pyon* (*d*), *Rex* v. *Sudbrooke* (*e*), *Rex* v. *Ruſhall* (*f*), and *Rex* v. *Leigh* (*g*), as caſes of diſſolution which materially trenched upon the other deciſions, and ſhewed that though the maſter urged the diſſolution of the contract, without or againſt the deſire of the ſervant; yet if the latter acquieſced by accepting the wages and departing from the ſervice before the end of the term, that put an end to the contract. Now here the pauper did not accept that which the maſter inſiſted to be her full wages,

(*a*) 8 & 9 *W.* 3 *c.* 30. *ſ.* 4.　(*b*) 3 *Term Rep.* 754.
(*c*) 6 *Term Rep.* 185.　(*d*) 4 *Eaſt*, 353.　(*e*) *Ib.* 356.
(*f*) 7 *Eaſt*, 471.　(*g*) *Ib.* 539.

1810.

The King *against* The Inhabitants of Hardhorn with Newton.

and which would conclude her from any further demand; which made an end of the contract on her part, as the turning her out of doors by the master concluded him on the other hand from any further claim to her service; and there was no longer any mutual remedy upon the contract.

Lord Ellenborough C. J. If indeed there were a conflict of cases upon this point, that would bring us back to the words of the act, the true import of which we should have to consider: but there is no material conflict of the cases, nor any thing in the construction contended for by the respondent's counsel which will clash with the words of the act. There must be an abiding in the service for a whole year in order to confer a settlement: and as far as lay in the power of the pauper, there was an abiding in it for a year: but she was wrongfully and forcibly turned out of doors by her master against her will; and when she returned the next day for her cloaths he gave her 4*l.* 10*s.*, which he said was the whole of her wages; but she did not assent to that, and demanded more, though she took what he was willing to give her in part, and offered to stay to the end of the year, maintaining her right to her full wages. She therefore did all she could to abide in the service according to her contract, and did so, except so far as she was prevented by an act of force. The case of *The King* v. *Grantham*, which is principally relied on to shew the dissolution of the contract, is very distinguishable. The servant there having been improperly turned out of doors by his master in the first instance, took him at his word, and refused to return to the service, though invited by his master so to do: and when the master at last agreed to pay him his full wages, he

he left the ſervice contrary to the expreſs requeſt of the maſter to ſtay.

1810.

The KING *againſt* The Inhabitants of HARDHORN with NEWTON.

GROSE J. In the caſe of *The King* v. *Grantham* there was an agreement by both parties to diſſolve the contract before the end of the year: and the ſame anſwer may be given to all the other caſes which have been held to be diſſolutions of the contract. But here there is nothing like conſent on the part of the ſervant. The maſter turned her out of doors againſt her conſent, and ſhe wiſhed to come back and perform her ſervice to the end of the year; but he would not permit her. Therefore though the ſervice was not performed, yet ſhe tendered herſelf to perform it, which is equivalent to the performance of it in law: and the contract could not be diſſolved by the wrongful act of the maſter in turning her away.

LE BLANC J. The firſt point which was ſuggeſted has been very properly abandoned now; for there is no doubt that the death of the maſter after the pauper was hired for a year; ſhe continuing to ſerve the widow and ſon on the farm; was a continuation of the ſame ſervice. Then with reſpect to the other point, it is now too late to recur back to the ſtrict words of the act of parliament, upon queſtions of diſpenſation or diſſolution of the contract: a long current of caſes has eſtabliſhed the diſtinction: and where the diſſolution of the contract has not been aſſented to by both parties, the Court has inquired into the cauſe of the maſter's diſmiſſal of his ſervant. Now here was a frivolous cauſe aſſigned by the maſter, which would not warrant him in turning the ſervant out of doors againſt her conſent; and ſhe offered to ſtay, but he refuſed to permit her. It was neceſſary however that ſhe

1810.
The King
against
The Inhabitants
of
Hardhorn
with Newton.

ſhould have her cloaths and ſomething to maintain her; therefore her taking her cloaths and what money he was willing to pay her does not ſhew her conſent to abandon the contract, which ſhe expreſsly offered to fulfil to the end of the year. Then after her departure, ſhe did not hire herſelf into another ſervice before the end of the year, as occurred in one (*a*) of the caſes, which was held to be a diſſolution of the contract. Here then the pauper did every thing ſhe could to continue in the ſervice, from which ſhe was wrongfully diſcharged: the Seſſions have decided that it was not a diſſolution of the contract; and I cannot ſay that they have decided wrongly.

Bayley J. It would be much better if the Seſſions would decide the fact (*b*), whether of the diſſolution of the contract, or of the diſpenſation of the ſervice, and abide by their deciſion, without ſending up a caſe with the evidence on which they formed their concluſion. In *The King* v. *Grantham* there was the conſent of both parties at one time to put an end to the contract, and the maſter wiſhing the next day to retract his conſent could not alter the caſe. But the queſtion here is, whether a wrongful act of the maſter can diſſolve the contract without the conſent of the ſervant. It would operate very unjuſtly if it could; for then maſters would often be induced to diſcharge their ſervants on frivolous pretexts towards the end of the year to prevent them from acquiring ſettlements.

Order of Seſſions confirmed.

(*a*) *Rex* v. *Leigh*, 7 *Eaſt*, 539.

(*b*) In *Rex* v. *St. Peter of Mancroft*, in *Norwich*, 8 *Term Rep.* 477. the Court recommended to the Seſſions to find the fact, whether the contract were diſſolved by mutual conſent, or the performance of the ſervice diſpenſed with by the maſter.

1810.

Doe, on the feveral Demifes of Marsack and Others, *againft* Read.

Monday, Jan. 29th.

The plaintiff in ejectment, under the feveral demifes of two, may, after notice to quit, recover the poffeffion of premifes held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant which was ftated in the receipts to be due to the two leffors; even affuming fuch receipts to be evidence of a joint tenancy; for a feveral demife fevers a joint tenancy; and fuppofing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this cafe, as he had the whole title in him.

It feems that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has alfo authority to determine fuch tenancies by a regular notice to quit.

THIS was an ejectment for meffuages and lands in the parifh of *Hinderwell* in the county of *York*, which was brought on the four feveral demifes of, 1. *C. Marfack*, 2. *R. Davifon*, 3. *J. C. Parkhurft* and wife, and 4. of *W. Boyd*; all of which were laid on the 8th of *April* 1809. At the trial before *Chambre* J. at *York* the following notice to quit was proved to have been ferved on the defendant on the 1ft of *Oct.* 1808. "I hereby give you notice to quit and deliver up to me or my fucceffor on the 6th of *April* next the poffeffion of all thofe feveral clofes, &c. (defcribing the premifes in queftion,) of which I am the receiver duly appointed by the Court of Chancery, or at fuch time or times as your current year of occupancy may expire." Dated 1ft of *October* 1808, and figned "*R. Davifon*." The appointment of *Davifon* by the Court of Chancery in the fuit after mentioned to the office of receiver for the eftates, of which the premifes were part, with a *power to let* the eftates, was alfo proved to have been made on the 9th of *April* 1806. Alfo copies of a bill and anfwer in Chancery. The plaintiffs in the bill, which was filed in *June* 1804, were feveral creditors of the faid *J. G. Parkhurft* and his wife: the defendants were the faid *C. Marfack*, as a truftee of eftates which had been allotted in Chancery to Mrs. *Parkhurft*, as the widow of Sir *G. Boynton*, on behalf of the creditors of Mr. and Mrs. *Parkhurft*, himfelf being one of thofe creditors; *J. B. Smith*, (fince dead, on whofe death *Davifon* was appointed receiver,) as receiver of the

rents

1810.

Doe, Lessee of Marsack and Others, against Read.

rents of the estates appointed by the said *Marsack*, and several other defendants. One object of the bill was to have an account of the rents and profits from *Smith* as well as from *Marsack*: and *Smith* having received the rents of the premises in question from the defendant, his answer, wherein he charged himself with the receipt of those rents, was produced to shew that the defendant by those payments acknowledged *Marsack* as his landlord. In that answer *Smith* stated that he was appointed receiver by *Marsack*, with the consent of *Parkhurst* and his wife, by deed dated 30th of *March* 1803, and had received the rents down to the 9th of *May* 1805, when his answer was sworn. The answer also referred to a schedule annexed, containing a recital of the estates of Mrs. *Parkhurst*, occupied by the defendant and others, as tenants from year to year, in which were entered acknowledgments of receipt of rent from the defendant by *Smith* half-yearly at *May-day* and *Martinmas*. There were also proved *receipts of rent* given by *Davison*, after his appointment in Chancery as receiver, *stating the rent to be due* half-yearly at *Lady-day* and *Michaelmas* to *C. Marsack, J. G. Parkhurst, and Mary his wife*. And no other evidence of title in any of the lessors was given.

On the part of the defendant it was objected, 1st, That *Davison*, as receiver with authority *to let*, was not authorized to determine the tenancy from year to year by his notice to quit. The learned Judge however inclined to think that he was so authorized. 2dly, It was objected that the evidence did not support any of the counts, which were all laid upon separate demises; whereas all the receipts given by *Davison*, the receiver, imported that *Parkhurst* and his wife were jointly interested in the estate with *Marsack*. But the learned Judge thought that the

form

form of those receipts, without any other evidence of a re-letting, was insufficient to destroy the effect of the payment of rent to *Marsack*'s agent acting under his sole appointment; and that the introduction of the names of Mr. and Mrs. *Parkhurst* probably arose from the receiver's ignorance of the state of the legal title, and from their being parties to the suit in equity, and beneficial owners of the property subject to the trusts. The plaintiff therefore took a verdict at the trial: but leave was given to move the Court on both points, and to enter a nonsuit if either of them were available. This motion was accordingly made in the last term, and a rule nisi granted; against which

Park and *Holroyd* now shewed cause. And, as to the first objection, they said that it was in frequent practice for receivers appointed by the Court of Chancery to determine tenancies from year to year by notice to quit; and that this had often been acted upon and recognized in actions at nisi prius: and they referred to *Wilkinson* v. *Colley* (a), where a notice to quit given by such a receiver was held sufficient to entitle the trustee of the legal estate to maintain an action of debt on the stat. 4 *G.* 2. *c.* 28. against a tenant who held over. Upon this point the Court said they had no doubt. To the 2d objection they answered, that it sufficiently appeared upon the whole of the evidence that the legal title was in *Marsack*, who was the trustee for the family. There was clear evidence of the defendant's acknowledgment that he held under him, by the payments of rent to *Smith*, as receiver for *Marsack*: and the subsequent receipts given to *Davison* were not inconsistent with the others, as it appeared that *Parkhurst*

(a) *Burr.* 2694, 8.

and

1810.

Doe, Lessee of Marsack and Others, against Read.

and his wife had the beneficial interest. But however this might be, there could be no objection to the plaintiff's recovery of the entire premises in this ejectment; for even if *Marsack* and Mr. and Mrs. *Parkhurst* were to be considered as joint tenants, each might recover their own share; and here was a demise from each, which would cover the whole interest. And though joint tenants who are seised per mie et per tout may join; yet no doubt they may also sever (*a*); and if one recovered his share in ejectment, he would be tenant in common with the tenant of the other two joint tenants.

Cockell Serjt. and *Lambe*; abandoning the first objection, after the intimation of the opinion of the Court against it; contended that the last receipts of rent by the receiver, upon account of *Marsack* and of Mr. and Mrs. *Parkhurst*, were as decisive, in the absence of all evidence of the legal title by the production of deeds, to shew that the defendant at the time he received the notice to quit held under a joint demise from the two, as the prior receipts would have proved a holding under *Marsack* alone at the time they were given. There is no question here as to the legal title: but the question arises only upon the evidence of a contract, whereby it appears that two parties have jointly contracted with the defendant to let the premises to him; it cannot therefore be competent to either of those persons to determine the contract which is entire: but if the plaintiff could recover the whole upon the separate demises of each, which can only be on the ground of each having a distinct title, and a separate right to determine the tenancy as to his share, it would entirely alter

(*a*) The case of *Roe* v. *Lonsdale*, decided a few days ago, *ante*, 39. was adverted to.

the

1810.

Doe, Lessee of Marrack and Others, against Read.

the nature of the contract entered into with them by the defendant. [The Court having called their attention to the demise by *Davison*, the receiver, the common agent of all the parties interested, and who, having a general authority to let by the Court of Chancery, must be taken to have a power of determining the letting, as he must determine for how long he will let;] they expressed a doubt whether by the practice of that Court the receiver had a power to determine a subsisting lease, without the leave and direction of the Court: and said that at all events *Davison* admitted by his receipts that he received the rents on account of the two parties therein named, with whom the entire contract must be taken to have been made.

Lord ELLENBOROUGH C. J. said that whatever difficulty there might have been in the way of the plaintiff's recovery, on the ground of the entirety of contract, if there had not been a demise from each of the parties interested; yet here the plaintiff having by the several demises of each the entire interest in the whole subject matter, and the several letting to the plaintiff having severed the joint tenancy; there was therefore no incongruity in his recovering.

The Attorney-General, as amicus curiæ, said that the rule was formerly considered to be, though he had never heard any reason assigned for it, that in laying demises in ejectment, tenants in common must sever, joint tenants must join, and parceners might either join or sever. But if joint-tenants might sever, it seemed difficult to say why tenants in common might not join, as each might still be taken to have demised according to his legal interest.

Per Curiam, Rule discharged.

1810.

Monday, Jan. 29th.

Doe, on the joint and several Demises of Allason Foster and Wm. Allason Jamieson, against Sisson.

Evidence of reputation of the custom of a manor, that, in default of sons, the *eldest daughter*, and, in default also of daughters, the *eldest sister*, and in case of the death of all, the *descendants* of the eldest daughter or sister respectively of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no farther than those of eldest daughter and eldest sister, and *the son* of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor.

THIS was an ejectment for a customary tenement, holden of the manor of *Castlerigg* and *Derwentwater* (*a*), and situate in the parish of *Crosthwaite* in the county of *Cumberland*. The person last seised was *Abraham Allason*, who died without issue, having had three sisters who died before him, leaving issue; and the question was, whether, upon his death, the tenement descended to the heirs of his three sisters, according to the course of descent at common law; or to the heir of the eldest sister only, by the custom of the manor. The eldest sister, *Ann*, married *William Sisson*, and died, leaving issue *Thomas S.*, who also died before *Abraham Allason*, leaving issue *Wm. Sisson*, the defendant, who claimed the whole as customary heir of the said *Abraham Allason*. The second sister, *Sarah*, married *J. Foster*, and died before her brother, leaving issue *Allason Foster*, one of the lessors of the plaintiff, and other younger children. The third sister, *Martha*, married *W. Jamieson*, and died before her brother, leaving issue *Wm. Allason Jamieson*, the other lessor of the plaintiff. At the trial before *Wood* B. at *Appleby*, the lessors of the plaintiff, who claimed two-thirds as heirs respectively of the two younger sisters of the person last seised, rested their case on the proof of the pedigree and the common law course of descent. The defendant insisted upon a custom in favour of the descent

(*a*) The commissioners of *Greenwich* Hospital are the lords of the manor.

1810.

DOE, Lessee of FOSTER and JAMIESON, against SISSON.

to the heir of the eldest sister, in exclusion of the others; and first proposed to prove that in other adjacent manors, where these tenant right customary estates existed, the course of descent was to the eldest sister and her heirs exclusively. This evidence was objected to on the part of the plaintiff; and the learned Judge, without deciding upon the admissibility of it, required the defendant to enter into his evidence of the custom as applicable to the particular manor in which the tenement in question lay. The steward of the manor accordingly produced the court books and rolls from the year 1739, and proved one instance in 1785 of the presentment by the jury of *C. A.* having died seised of several messuages, &c., "and that *Elizabeth A. his sister was heiress at law,* and ought to be inrolled;" and there was an affeeriment of a fine upon her, and she was inrolled tenant, and enjoyed the estate. It further appeared that she had at the same time several younger sisters living. There was another instance of a presentment in 1806 that *T. L.* died seised of a customary tenement; and that *his nephew* and heir at law *J. W.* ought to be admitted tenant; and he was accordingly enrolled tenant: it being also proved that *T. L.* had five sisters, *the eldest* of whom was the mother of *J. W.* and other younger children; and the other sisters, who all died before *T. L.*, also left issue. Another instance was of *J. F.* a customary tenant, who died leaving two daughters, *Ann*, who had married *T. G.*, and *Elizabeth* who had married *D. C.* In 1793 the jury presented that *T. G.* died seised as mortgagee of several parcels of land, &c., and that *Ann G.* is heir and ought to be admitted; and *Ann G.* paid a fine for a descent as mortgagee on the death of *J. F.* her father. It was also proved by an aged witness, who had himself been possessed of property in the

manor

1810.

Doe, Lessee of Foster and Jamieson, against Sisson.

manor since 1774, that *the reputation* of the custom was that in case of a person dying seised, leaving only daughters, the eldest daughter takes; leaving only sisters, the eldest sister takes; and in case all are dead, *the descendants of the eldest take.* The steward also, who had been in office 15 years, spoke to the reputation of the custom, that the estate descends to the eldest sister when a brother dies seised, leaving more sisters than one. The learned judge being of opinion that these facts were primâ facie evidence of a custom in this particular manor to entitle the defendant to the whole, as heir of the eldest sister, would have left the case to the jury upon that evidence; but the plaintiff's counsel chose to be nonsuited, intending to take the opinion of the Court, whether, as no instance was in fact proved of a customary descent to a collateral representative, so far removed as a *great nephew* from the person last seised, but only of a descent to a sister's son, the custom could be extended so far by the general evidence given in this case. Accordingly,

Park in the last term obtained a rule nisi for setting aside the nonsuit, which was now supported by him and *Littledale*; and in support of their objection to the evidence they relied on the case of *Denn d. Goodwin and others* v. *Spray* (a), where proof of customary descents to eldest daughters and *eldest sisters*, in exclusion of younger daughters and sisters, was held not to extend to an *eldest niece*: and yet it appeared in that case from an ancient customary of the manor, found amongst the court rolls, and therefore stronger than evidence of mere oral reputation, that "nulla tenementa manerii erunt partibilia nec inter hæredes masculos nec famellas." But the

(a) 1 *Term Rep.* 466.

1810.

Doe, Lessee of Foster and Jamieson, against Simson.

Court, relying upon the doctrine of Lord *Coke*, in *Ratcliff* v. *Chapman* (*a*), that to prove a custom it must be shewn by precedents to have been *put in use*, and that reputation only was not sufficient; held that where the custom was silent, or in other words was not proved by precise precedent, the common law must regulate the course of descent. In support of the same doctrine, they also referred to 1 *Roll. Abr.* 624. *pl.* 2. and *Godb.* 166.; and argued, that the jus representationis only applied to the right of succession and descent at common law; and unless the customary heir is entitled to seisin, the custom does not attach: for no right attached in the eldest sister during the life of her brother.

Topping and *Holroyd*, on opposing the rule, in answer to a question from the Court, waved any reliance upon the evidence of the custom of other manors offered at the trial; which it seemed to be agreed now was not evidence for the present purpose. (*b*) And as to the principal point, they denied any necessity to shew a particular instance of an immediate descent to a great nephew of the person last seised. The customary right of descent to an eldest sister was not disputed; and then the common law attached upon the custom to carry the estate, in case of her death, to her male heir, jure representationis. The younger sisters, taking nothing by the custom, could not transmit any estate to their descendants.

Lord ELLENBOROUGH C. J. The objection made is to the want of evidence of any instance where the grandson of an eldest sister of the person last seised has taken im-

(*a*) 4 *Leon*, 242.

(*b*) *Vide* S. P. by Lord *Kenyon* C. J. in *Roe* v. *Parker*, 5 *Term Rep.* 30.

 mediately

1810.

DOE Lessee of FOSTER and JAMIESON, *against* SISSON.

mediately by the custom: but there was evidence of *reputation*, as to the custom of the manor, that in case all the daughters or sisters of the person last seised were dead at the time of his death, the descendants of the eldest of those should take. And though this reputation in its generality went beyond the particular instances proved in which the custom had been put in use, (which, however, was established not only in the case of the eldest sister's taking, but also of the eldest sister's son's taking, upon the death of the tenant last seised;) yet how can we say that it was not evidence to go to the jury (which is the question we are now to decide) of the larger custom, of which the particular instances proved were only so many branches derived from the same root. We do not take upon us to decide that the existence of the reputation proved that the custom existed in this extended degree; we only say that it was evidence to go to the jury. If the Judge had decided improperly, in stating that he should leave that evidence to the jury, we would have taken care that the plaintiff should not be prejudiced by voluntarily submitting to a nonsuit in deference to that opinion; but we see no reason to disapprove of it. If the lessors of the plaintiff have evidence to contradict the reputation, they are not concluded by this nonsuit.

The other Judges accorded with this opinion; and by

LE BLANC J. The question as to the custom stands more favorably for the lessors of the plaintiff upon the nonsuit, than if the question of fact had gone to the jury, and they had found, as they probably would have done, that the custom did exist to the extent contended for by the defendant: for then the existence of the custom

1810.

DOE, Lessee of FOSTER and JAMIESON, *against* SISSON.

tom would have ftood upon the verdict of a jury finding the fact. But it is ftill open to the leffors, if upon further fearch they fhould difcover any inftance in which the grandfon of an eldeft fifter did not take under fimilar circumftances, to bring the queftion forward again in another ejectment.

Rule difcharged.

MASSEY *againft* JOHNSON.

Wednefday, June 14th, 1809

The ftat. 43 G. 3. c. 141. does in no inftance extend to protect juftices of peace in the execution of their office againft actions for acts of trefpafs or imprifonment, unlefs done on account of fome *conviction* made by them of the plaintiffs in fuch actions by virtue of any ftatute, &c. But whether certain proceedings alleged by the plaintiff to have been fet on foot againft him by the defendant, a juftice of the peace, ex mero motu, without any information laid on oath before him, (though falfely alleged to be on the information on oath of *J. S.*,) on which the plaintiff was taken and imprifoned, were a *conviction* within the meaning of the act; fo that the plaintiff was thereby confined to feek redrefs by an action *on the cafe* framed as the act directs; the Court would not inquire of on affidavit, but fent the cafe to a new trial to have the fact of fuch conviction afcertained. And it appearing on a fecond trial, that an information on the oath of *T. O.* on a charge of vagrancy againft the plaintiff was laid before the magiftrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magiftrate then made out a warrant of commitment until the next Seffions, in which warrant it was wrongly ftated that the plaintiff had been charged *on the oath of* T. S, (who negatived having made any fuch oath;) but which allegation it was held might be rejected as furplufage; and afterwards drew up a conviction dated on the fame day, but not exhibited till a month afterwards at the feffions: held that this was fufficient evidence of a conviction connected with the imprifonment, however informally fuch conviction or warrant of commitment operating as a conviction were drawn up; and, therefore, that at all events the magiftrate was protected againft this action of trefpafs.

The magiftrate is liable to anfwer in an action for fuch part of an imprifonment fuffered under his warrant as was within fix calendar months before the action commenced againft him.

THIS was an action of trefpafs and falfe imprifonment, which was brought againft a magiftrate of the county of *Chefter*, in confequence of a commitment by him of the plaintiff to the houfe of correction, under a proceeding which was contended by the magiftrate to be a conviction of the plaintiff as a vagrant. At the firft trial before the Chief Juftice of *Chefter*, it was opened by the plaintiff's counfel, and propofed to be proved, that no information had been taken by the defendant which could warrant any conviction or commitment, but that the magiftrate had proceeded ex mero motu; and they began

before

1810.

MASSEY *against* JOHNSON.

by proving the notice of the action, served above a month before the action brought, directed to the defendant "*one of his majesty's justices of the peace* for the county of *Chester;*" and stating in substance that the defendant having on the 27th of *March* 1808, *as one of his majesty's justices of the peace* for that county, caused the defendant to be *apprehended and unlawfully committed* to the house of correction, and there *imprisoned* for 4 months then next following, the plaintiff, according to the form of the statute, gave him notice that after the expiration of one calendar month he should sue out a writ of latitat against the defendant in *B. R.* for the said imprisonment, and proceed against him thereupon according to law. Upon this it was immediately objected for the defendant, that the case was within the late act of the 43 *Geo.* 3. *c.* 141. and that the action of *trespass* was not maintainable; and thereupon, without entering further into the case, the plaintiff was nonsuited.

That statute, reciting that justices of the peace, who are authorized and required by divers acts to convict persons of offences in a summary way, should be rendered more safe in the execution of their duty, enacts, "that in all actions whatsoever brought against any justice of the peace on account of any *conviction* by him made by virtue of any statute, &c., or by reason of any act, matter or thing whatsoever, done or commanded to be done by such justice for the levying of any penalty, apprehending any party, or for carrying any such conviction into effect, *in case such conviction shall have been quashed,* the plaintiff in such action (besides the penalty, if levied, &c.) shall not be entitled to recover any more damages than 2*d.*, nor any costs, unless it shall be expressly alleged in the declaration in the action in which the recovery shall be had, *and which shall be in an action upon the case only,* that such

acts

acts were done maliciously and without any reasonable and probable cause."

Topping (with whom were *Yates* and *Richardson*) moved in the last term to set aside the nonsuit (*a*), contending, upon the authority of *Morgan* v. *Hughes* (*b*), that *trespass*, and not *case*, was the proper remedy in this instance: and that the act of parliament must be confined to cases where the magistrate had a jurisdiction, and a conviction had been made, regular at least in the form and manner of proceeding, and not where he had proceeded without any information on oath laid before him, and therefore without any semblance of authority. A rule nisi being granted,

The Attorney-General and *J. Williams* now shewed cause against it, and relied upon the positive words of the statute, that a magistrate should not be liable for any act, matter, or thing done or commanded by him, for carrying any conviction into effect, in case such conviction shall have been quashed, (which of course assumes that it was illegal) except *in an action upon the case only;* and even then the plaintiff shall not be entitled to recover more than 2*d.* damages (over and above the penalty, if levied,) unless the declaration alleges that the act was done mali-

(*a*) At the same time *Topping* stated, by way of objection, that the cause had gone down to trial at *Chester* by mittimus, without an order for a special jury; and after it was entered, application was made to the Court there, by the defendant, for a special jury; which the plaintiff opposed; but the Court at *Chester* granted it; saying that it was their practice so to do. *Le Blanc* J. asked how advantage could be taken of this upon the motion to set aside the nonsuit then before the Court. And Lord *Ellenborough* C. J. afterwards said that the objection, if any, was cured by the plaintiff's appearance.

(*b*) 2 *Term Rep.* 225.

1810.

MASSEY *against* JOHNSON.

ciously and without any reasonable and probable cause. If an action of trespass therefore may be brought, to which that injunction does not apply, the magistrate will be deprived of the benefit of the statute. It is only magistrates who happen to have acted illegally who are liable to be sued with effect at all, and the statute meant to protect them against damages in every case but where they had acted from malice and without probable cause.

The Court having asked the Attorney-General, whether he meant to contend that the statute extended further than to protect magistrates in cases where there had been a *conviction* in form: and being answered in the negative; after some consultation

Lord ELLENBOROUGH C. J. said, that such being their consideration of the meaning of the statute, that it was confined to cases where there had been a conviction by the magistrate; it seemed to them that the progress of the cause had been stopped too soon, before it had appeared whether there had been a conviction or not; and therefore it was necessary that the cause should go to trial again in order to have that fact ascertained.

On this *J. Williams* said that they had now an affidavit of the fact of a conviction having been made by the magistrate; which might save the expence of taking the cause to trial again. But *the Court* said that they could not take notice of that affidavit; for if they received it, they must let in affidavits on the part of the plaintiff denying the conviction, and so they should have to try the fact upon affidavits. And afterwards

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Lord ELLENBOROUGH C. J. said: It appears to me that the true construction of the act is, to confine the protection given by it to magistrates to cases where there has been in fact a *conviction*: and if there were a conviction in fact in this case, it would answer no purpose to the plaintiff to carry the cause to trial again; but as that matter was not ascertained at the former trial, we must send it to another.

All the other Judges concurred in this: and *Le Blanc* J. added, that if the construction of the act were otherwise, it would go the length of saying that in no case would trespass lie against a magistrate for any act done by him in his official character, whether there had been any conviction or not; which could not have been the meaning of the legislature. The Court however in making the rule absolute said, that they would open it again if any thing occurred to themselves before the end of the term; or upon the suggestion of the defendant's counsel, to render the construction of the act more doubtful than it at present appeared to them. But a few days afterwards the *Attorney-General*, expressing his acquiescence in the opinion before delivered by the Court, that the act was confined to the case of convictions, the rule stood absolute as it had been before ordered.

At the second trial it appeared that the plaintiff, who had previously resided at *Wilmslow* in the parish of *Bollensee* in *Cheshire*, where he had property in houses estimated at 7 or 800*l.*, had been imprisoned under civil process from some time in 1806 till the 27th of *Feb.* 1808, when he was discharged: and that on the 15th of *March* he came to a friend's house near *Wilmslow*, and

1810.

MASSEY *against* JOHNSON.

removed from thence on the 21ſt to another place in the neighbourhood. That during the greater part of the time the plaintiff was abſent from home, he left his wife and children without any proviſion, and the latter were maintained by the pariſh of *Bollenſee* in their poor houſe. That *Thomas Smith*, an overſeer of the poor of *Bollenſee*, had complained on this ſubject both to the defendant and to others, and the defendant had ordered the pariſh officers to relieve the plaintiff's family; but *Smith* himſelf expreſsly negatived that any information or complaint upon oath was ever made by him to the defendant againſt the plaintiff for any ſuppoſed act of vagrancy. That on the 26th of *March* 1808 the defendant delivered to the conſtable of *Stockport* a warrant to apprehend the plaintiff, dated the 19th of that month; which reciting that *Thomas Smith*, preſent overſeer of the poor of *Bollenſee*, &c., *had made information and complaint upon oath* before the defendant, one of his majeſty's juſtices of the peace, &c., that *J. Maſſey*, late of *Bollenſee* aforeſaid, check manufacturer, had run away and left his wife and children chargeable (*a*) to the townſhip of *B.* aforeſaid; commanded the conſtable forthwith to apprehend the plaintiff and bring him before the defendant, &c. *to anſwer the ſaid information and complaint.* Upon this warrant the plaintiff was apprehended on the next day, which being *Sunday*, he was brought before the defendant on *Monday* the 28th, in the cuſtody of *Thomas Occleſtone*, conſtable of *Bollenſee*, when the plaintiff, on being examined, refuſed to part with his property in order to provide for his family, or to give ſecurity to the pariſh; and having previouſly declared his intention to go away, the defendant

(*a*) This is an act of vagrancy by ſtat. 17 *G.* 2. *c.* 5.

took

took the examination on the oath of *Thomas Occlestone* then present, in which he deposed that the plaintiff had left *Wilmslow*, his place of residence in *Bollensee*, in *Oct.* 1806, and that his family consisting of a wife and two children had been chargeable to the township of *B.* since *March* 1807. Whereupon the defendant on the same 28th of *March* made out the following warrant of commitment of that date. "County of *Chester.*—To the keeper of the "common gaol, &c. Receive into your custody the "body of *J. Massey* herewith sent you, brought before "me (the defendant) one of his majesty's justices, &c. "by *T. Occlestone*, constable of the township of *Bollensee*, "&c., *being charged on the oath of* Thomas Smith, over-"seer of the poor of the said township, &c. with running "away and leaving his wife and two children, whereby "they have been chargeable to the said township of *B.* "since the 1st of *March* 1807; and him safely keep in "your custody until the next General Quarter Sessions, "and until he shall be discharged by due course of "law," &c. The defendant afterwards at the next Quarter Sessions on the 26th of *April* put in the following conviction. "County of *Chester*, to wit.—Be it remem-"bered, that *John Massey*, late of *Bollensee* in the county "of *Chester*, chapman, is this day convicted before me, "one of his majesty's justices of the peace in and for the "said county, of being a rogue and vagabond; for that "he the said *J. M.* between the 1st of *Jan.* 1808 and "the 1st of *Feb.* 1808 did run away and leave his wife "and family chargeable to the township of *B.* aforesaid." (Dated 28th of *March* 1808, and signed and sealed by the defendant.) This conviction was proved and relied upon at the trial by the defendant as an answer to the action;

1810.

MASSEY *against* JOHNSON.

action (*a*); the reſt of the evidence having been adduced by the plaintiff, or obtained on croſs examination of his witneſſes. And in order to ſhew that the action was brought in time, the plaintiff further proved the notice of action before ſtated (*b*), and the latitat iſſued in this ſuit indorſed with the name of the agent of the plaintiff's attorney, and with the date of the 8th *Oct.* 1808, when it was ſued out.

Two objections were taken on the part of the defendant to the action: 1ſt, That it was brought too late; the writ having been ſued out on the 8th of *Oct.*, more than ſix months after the cauſe of action (*c*), which accrued on the 28th of *March*. 2dly, That the conviction, while it remained in force, concluſively protected the defendant from being queſtioned in this form; according to the caſe of *Strickland* v. *Ward* (*d*). But in order to ſave further

(*a*) At the Quarter Seſſions, held at *Cheſter* on the 26th of *April* 1808, the plaintiff, by an order of that Court, reciting his commitment by the defendant for the cauſe ſtated in the warrant of commitment, was remanded to the ſame cuſtody until the next Seſſions, or until he ſhould be otherwiſe diſcharged by due courſe of law.

(*b*) Ante, 68. (*c*) *Vide* ſtat. 24 *G.* 2. *c.* 44 *ſ.* 8.

(*d*) *Wincheſter* Summer Aſſizes 1767, coram *Yates* J., cited in *Lovelace* v. *Curry*, 7 *Term Rep.* 633, 4. Vide *Hill* v. *Bateman and Another*, 1 *Stra.* 710. where in an action of treſpaſs and falſe impriſonment againſt a juſtice of peace and a conſtable, the caſe was, that the magiſtrate had convicted the plaintiff for deſtroying game; (the ſtat. 5 *Ann. c.* 14. *ſ.* 4. giving a penalty for this offence to be levied by diſtreſs, and only enabling the magiſtrate to commit the offender to the houſe of correction *for want of ſuch diſtreſs;*) and though it was proved that the plaintiff had effects which might have been diſtrained ſufficient to anſwer the penalty, yet the defendant ſent him immediately to *Bridewell*, without endeavouring to levy the penalty—Ld. C. J. *Raymond* held that the action lay againſt the juſtice. And, as the report ſtates, it was agreed that juſtices of peace, in ſuch caſes, were obliged to ſhew the regularity of their convictions; *and that the informations, &c.* laid before them, upon which their convictions were grounded, *muſt be produced and proved in court.* This opinion muſt have

ther expence to the parties the whole case was left to the jury, in order to assess the damages, in case the plaintiff should ultimately be considered as entitled to recover; reserving the question of law for the consideration of this Court. The jury accordingly found a verdict for the plaintiff for 20*l.* damages: and leave was reserved to the defendant to move to set aside that verdict, and enter a nonsuit, if the Court were of opinion that either of the objections to the action was well founded. A rule nisi was accordingly obtained for that purpose in the last term, which now came on to be argued.

Wednesday, Jan. 31st.

Upon the first point it was observed by *Le Blanc* J. that the plaintiff was estopped by the lapse of more than six months before the action brought from insisting upon the

have been given upon the supposition that it was necessary to shew such information laid before the magistrate in order to give him jurisdiction, in the particular case, for the purpose of protecting himself: for with respect to the constable who had executed the warrant of commitment, it was clearly agreed that the warrant was a sufficient justification; it being a matter within the general jurisdiction of the justice. But in the case of *Strickland* v. *Ward*, it does not appear that Mr. Justice *Yates* required any other evidence to be produced in justification of the magistrate than the conviction itself, and the warrant of commitment granted thereupon; on which, says Mr. Justice *Yates*, in his own MS. "I gave my opinion that this conviction could not be controverted in evidence; that the justice, *having a competent jurisdiction of the matter*, his judgment was conclusive till reversed or quashed; and that it could not be set aside at nisi prius." The jurisdiction of the magistrate being granted, the conclusiveness of the conviction in a collateral proceeding, that is, the propriety of the conclusion drawn by him from the whole matter before him, seems clear upon principle and all the authorities: the only questions upon these cases would be, Whether, as against the magistrate himself, the conviction alone would be conclusive evidence of his jurisdiction in the particular case; or, if not conclusive, at least presumptive evidence of it; or, whether it were necessary for him to shew the information on oath laid before him; or competent for the plaintiff in the action to negative by evidence the fact of any such information, as stated by the magistrate in his conviction, having been laid before him, in order to shew that he had no jurisdiction in the particular case. Vide *Crepps* v. *Durden*, *Cowp.* 640. *Davison* v. *Gill*, 1 *East*, 64. and *Welch* v. *Nash*, 8 *East*, 394.

illegality

1810.

MASSEY *against* JOHNSON.

illegality of the caption under the warrant of apprehension, grounded as the plaintiff's counsel insisted upon a false allegation that *Thomas Smith*, the overseer of the poor of *Bollensee*, had made information and complaint upon oath before the defendant that the plaintiff had committed an act of vagrancy. But it being observed by the plaintiff's counsel, that the plaintiff continued in gaol under the defendant's commitment of the 28th of *March* down to the 26th of *April* (after which his further imprisonment was under the order of the Quarter Sessions), which was within the six months before the suing out of the writ on the 8th of *Oct.*, this objection finally took another shape; upon which the question was, Whether the imprisonment under the commitment of the 28th of *March* could be covered by the conviction, which was not exhibited and, for aught that appeared, was not drawn up and executed by the defendant till the 26th of *April*; and there being no proof of any minutes of a conviction made on the 28th of *March*, which was contended to be necessary to warrant the antedating of a more formal conviction. But *the Court* had no doubt, that supposing the magistrate to have had jurisdiction to convict, and that upon information laid before him upon oath he had in fact convicted the plaintiff on the 28th of *March*, it was competent to him to draw up the conviction at a future time in regular form, and to protect himself by it. And here, they observed, that the conviction purported on the face of it to have been made on the 28th of *March*: and there was no evidence to shew that it was in fact made at any other time. But the difficulty felt by the Court, as expressed by the Lord Chief Justice, was this; supposing the conviction drawn up in this general form to be sufficient for this purpose, (which was denied by the plaintiff's counsel;

ſel; and admitted by the defendant's counſel to be informally drawn up,) how the impriſonment under the warrant of commitment could be connected with it; there being no internal reference to connect the two papers: and then the warrant of commitment expreſſing upon the face of it to have been made upon the information on oath of *Thomas Smith*; an allegation which was ſhewn by evidence to be falſe; it was difficult to refer that to a legal and valid conviction, which muſt be preſumed to have proceeded upon a true fact.

Topping, *Yates*, and *Richardſon* for the plaintiff adopted this ſuggeſtion, and further contended, that whether the record of conviction, on which the defendant reſted his juſtification at the trial, were or were not connected with the warrant of commitment, the defence equally failed. If not connected, the conviction appeared to have been made without any information on oath, or any hearing of the party accuſed, and was therefore illegal and void both in form and ſubſtance. For though a magiſtrate may proceed in ſuch caſes upon his own view; yet if he allege his conviction to be founded upon the information of another, and ſuch allegation be proved to be falſe, the foundation fails. And a magiſtrate cannot protect himſelf againſt an action for falſe impriſonment by drawing up a paper in the name of a conviction without any facts to warrant it. But if the inſtruments were connected, then the conviction partook of the original vice of the commitment, which was founded upon the allegation of a falſe fact. Conſidering them as unconnected, there was no conviction either in fact or in law to juſtify the impriſonment. The warrant of commitment was not of itſelf a conviction; it did not profeſs

to

1810.

MASSEY *against* JOHNSON.

to be so; and in *Rex* v. *Rhodes* (a), confirmed in *Rex* v. *Cooper* (b), such a warrant was held to be illegal for want of a previous conviction. The warrant of commitment ought, as it was there said, to include a conviction. The magistrate ought to have stated that there was an information on oath laid before him of such and such facts (amounting to an act of vagrancy); and that after hearing the evidence before the accused, and his defence, if any, he had found him guilty of the offence; and then he should proceed to his commitment. They further contended that the stat. 43 *Geo.* 3. *c.* 141. only extended to cases where there had been a conviction, and that conviction had been *quashed*; for the legislature considered, that while the conviction remained in force, the magistrate having jurisdiction to convict in the particular instance would be protected by it in any collateral proceeding, as before the statute; and therefore only needed the protection of the statute where the conviction had been quashed, as it might be, for any irregularity in the form of the proceeding. It was therefore still competent for the plaintiff in this case to bring his action of trespass, the conviction not having been quashed, though insufficient to protect the defendant, by reason of the falsity of the allegation, as to the information on oath of *T. S.*, which was the foundation of the defendant's jurisdiction in the particular case. And they also suggested that the act was confined to cases where a defendant has been convicted in a penalty; for

(a) 4 *Term Rep.* 220. In *Hil.* 37 *Geo.* 3. this Court quashed a similar instrument, drawn up in the same words as the warrant of commitment in *Rex* v. *Rhodes*, which was intended to have effect as a conviction and commitment in execution, and ordered the party, *Richard Devereux Combe*, who was brought up on habeas corpus, to be discharged.

(b) 6 *Term Rep.* 509.

it

it says that the plaintiff in the action, *besides* the amount of the *penalty* levied, in case any levy thereof shall have been made, shall not be entitled to recover more than 2*d.* damages, &c.

In answer, however, to this part of the argument, it was said, e contrà, that the act was plainly not confined only to cases where penalties were or might be levied, but that it extended to every case, whether a penalty were leviable or not; providing only for the recovery of the penalty, if levied, in addition to the damages, where the conviction has been quashed. And of this opinion were the whole Court.

The Attorney-General, *Crosse*, and *J. Williams*, in support of the rule, observed with respect to the argument, that the stat. 43 *G.* 3. applied only to cases where the conviction had been *quashed*; that the legislature could never have intended to protect magistrates after their convictions had been adjudged to be bad, and were quashed, and yet to leave them unprotected while their convictions were still nominally in force, however vicious in the form of them. It certainly was their intention to protect the magistrates by this statute in every case where the conviction itself did not protect them. They then contended upon the principal question, that it was sufficient if the magistrate, on hearing the information or complaint, upon oath, and the defence of the party accused, came to the conclusion that he was guilty; for that was a conviction; and it was competent to him to draw up such conviction in formal language at any time afterwards; and this, whether he had made minutes of the proceeding at the time or not, however proper it might be, for the sake of certainty, to make such minutes.

Then

1810.

MASSEY against JOHNSON.

Then taking the whole of the facts together as proved in evidence, it appeared that the plaintiff had been legally convicted, although such conviction had not been drawn up and committed to writing in proper form. There was a regular information on oath, laid before him on the 28th of *March* by *T. Occleſtone*, of *Bollenſee*, charging the plaintiff with having deserted his family for some time previous, and that they had been chargeable to the township: and the plaintiff himself, when questioned, refused to provide for them or to give security to the township, though he had property there sufficient for the purpose. The defendant must then have come to the conclusion that he was guilty; for the warrant of commitment dealt with the plaintiff as a person who stood convicted. This is the effect and substance of it; though not correctly expressed in the warrant; for it states the evidence of the act of vagrancy to be the vagrancy, when the magistrate ought regularly to have convicted the plaintiff of being a vagrant upon that evidence stated, and upon the result of the hearing of the whole matter of the charge and defence: and there is also a palpable mistake in stating the charge upon oath to have been made by *T. Smith*, instead of *T. Occleſtone*, by whom it was in fact made. Then the conviction afterwards drawn up, with which the commitment is connected by the whole scope of the evidence, expressly states the plaintiff to have been, on the same 28th of *March*, convicted before the defendant of being a rogue and vagabond, upon the fact of deserting his family and leaving them chargeable to the township. But however irregularly the conviction or the warrant of commitment may be drawn up, it is not less a conviction *in fact*, and does not the less bring the convicting magistrate within the protection of the statute.

 Suppose

1810.

MASSEY *against* JOHNSON.

Suppose an action on the case had been brought, and these facts had been proved, it could not have been objected by the defendant to such an action, that the conviction was irregular, or that the warrant of commitment was not issued for the purpose of carrying that conviction into execution; and therefore that the action ought to have been trespass. When the facts of a conviction and of the warrant of commitment were given in evidence, it was competent to the plaintiff to contradict the fact, stated in the warrant, of the information not having been given on oath by *T. Smith*. But though the conviction and the warrant of commitment were not connected by the evidence, it would be sufficient for the purpose of defence against this action, to shew that the warrant of commitment was itself a conviction, though an irregular one, to entitle the defendant to the protection of the act. The magistrate heard the plaintiff upon a charge of vagrancy; and must either acquit or convict him: then, if he send him to gaol to be there kept till the next sessions; as a commitment under the vagrant act to the next sessions is a commitment in execution; this of itself operates as a conviction, however informally it may be drawn up. The commitment states the same facts as the conviction.

Lord ELLENBOROUGH C. J. I will assume for this purpose that there ought to be a regular ground-work for the conviction of the plaintiff on the 28th of *March*; but there was in fact a regular information on oath laid before the magistrate, and a hearing of the plaintiff upon the charge. Then the magistrate being warranted in taking cognizance of the charge, and in committing the party, if in fact he did convict him of that charge; after a conviction in fact the magistrate was authorized to

 commit

1810.

Massey *against* Johnson.

commit the plaintiff; and the conviction might be drawn up in form at a future time. Then having in fact convicted, and being warranted to commit, the plaintiff, though the defendant has misrecited in the warrant of commitment that he acted upon the information *on oath of Thomas Smith*, when in truth it was upon the information of another person; yet that may be rejected as surplusage, and the rest of the commitment will stand good. This recital of a false fact in the warrant of commitment is the only thing which has kept my mind in suspense, on account of the difficulty of connecting the imprisonment under it with the conviction: but by rejecting from the warrant of commitment the words as to the person by whom the information was made, the warrant will stand good for this purpose: and then the conviction, which may be drawn up at any time afterwards, if in fact the party were convicted, and which was afterwards exhibited, shews that the plaintiff was convicted of the offence for which he was committed. This is sufficient at all events to protect the magistrate in this action.

The other Judges expressed themselves satisfied on this ground. And *Le Blanc* J. added, That the objection would have assumed a very different shape, if there had been no information on oath of any person whereon to found the conviction; the information on oath of *T. Smith*, on which the conviction professed to be founded, having been negatived by the evidence: but there was in fact an information on oath laid before the magistrate by *T. Occlestone*, which at all events authorized the proceedings.

Rule absolute.

1810.

FELL, Clerk, *against* WILSON.

Thursday, Feb. 1st.

Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought on the stat. 2 & 3 *Ed. 6.* c. 13 for not setting out the tithes, the vicar, in a conversation with the farmer, had demanded *his tithes in kind*, on which the other tendered him 40*s.* (the annual composition,) which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal: and held also that the farmer, not having denied the vicar's right to tithe in kind before the action brought, was not precluded from taking the objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind.

THE plaintiff, as vicar of the parish of *Warcop* in *Westmoreland*, brought debt upon the stat. 2 & 3 *Ed.* 6. *c.* 13. against the defendant for not setting out the tithes of potatoes and other vegetables. At the trial before *Chambre* J. at *Appleby* much evidence was given on the part of the vicar, which satisfactorily established his right to the tithes in kind of the articles in question, and negatived the existence of any modus; expecting, as it seemed, that defence to be set up by the defendant. But it appeared that the tithes of the defendant's estate had been always or generally retained by the occupiers under agreements and compositions from time to time made with the vicar for different periods, varying in the sums; and for some time back 40*s.* a year had been received by the vicar of the defendant. And no notice to determine the composition, analogous to a notice to quit, having been proved; it was objected that the composition continued in force, and therefore that this action was not maintainable: but the learned Judge, considering the contention between the parties to be, whether there existed a modus or not; and considering the defendant as thereby denying the composition, and any title in the plaintiff to take tithe in kind; and thinking the case analogous to that of a tenant from year to year disclaiming to hold of his landlord; overruled the objection, but saved the point; and the plaintiff took a verdict for 1*s.* as the single value.

1810.

FELL, Clerk, *against* WILSON.

Raine moved in the laſt term to ſet aſide the verdict and enter a nonſuit, upon the authority of the caſe of *Hewitt and others* v. *Adams*, in the Houſe of Lords, in 1782 (*a*), where it was decided by the unanimous advice of all the Judges, recognized in *Wyburd* v. *Tuck* (*b*), and *Biſhop* v. *Chicheſter* (*c*), that the like notice was required to determine a compoſition for tithes as to quit land tenanted from year to year.

LE BLANC J. aſked whether the defendant had denied the vicar's right to the tithes before the action brought, or only in Court, by putting him upon the proof of his title; for that, he thought, made all the difference. And being anſwered that the defendant had not denied before the action the compoſition payable to the vicar, which the latter had before received; the Court granted a rule niſi.

(*a*) *Adams*, the leſſee of the tithes, claiming under Dr. *Waller*, the vicar of *Kenſington*, filed his bill againſt *Hewitt* and others, nurſerymen in that pariſh, who had before made a compoſition with Dr. *Waller* at ſo much an acre for their nurſery grounds; ſtating that he had ſerved them with notices to determine their compoſitions, and requiring them to ſet out their tithes, which they had neglected to do, and praying an account for the value of all the tithes ſince the termination of the compoſitions. To which the defendants below put in their anſwers, inſiſting, 1ſt, That the compoſition was to enure during the incumbency of Dr. *Waller*: 2d, That if determinable, it was not properly determined by the notices that had been given: 3dly, That hothouſe and greenhouſe plants, exotics, &c. were not titheable. The Court of Exchequer having decreed an account to be taken againſt the nurſerymen, they appealed to the Houſe of Lords; and that Houſe, after hearing counſel upon the following preliminary point, Whether the notice given were ſufficient notice to determine a compoſition for tithes; put this queſtion to the Judges; "Whether the notice given on the 8th of *Sept.* were a ſufficient notice to determine a compoſition for tithes from year to year; ſuch years commencing on the 29th of *Sept.*?" On the 19th *April* 1782 Mr. Juſtice *Gould* delivered the unanimous opinion of the Judges preſent upon the ſaid queſtion, that ſuch notice was not ſufficient. Whereupon the judgment complained of (ſo far as it related to the cauſe abovementioned) was reverſed. Appeal Papers in Dom. Proc. with MS. Judgments. And vide 7 *Bro. Caſ. in Parl.* 64. (edited and continued by *Tomlins*) S. C. and alſo 3 *Gwill. Tithe Caſ.* 1204. S. C. and 4 *Gwill.* 1323.

(*b*) 1 *Boſ. & Pull.* 458. (*c*) 2 *Bro. Ch. Rep.* 162, 3.

And

1810.

FELL, Clerk, *against* WILSON.

And now upon reading the report of the evidence given at the trial to the purport before ſtated, it appeared that the learned Judge before whom the cauſe was tried, upon further conſideration of the evidence, and of the courſe which the trial took, was induced to think that the reſiſtance by the defendant to the plaintiff's title at the trial lay principally in his putting the plaintiff to the proof of it, and not in producing evidence againſt it, or croſs-examining to that point, except that one of the witneſſes was aſked whether he had ever known the vicar collect tithe in kind of the articles in queſtion; and that another witneſs ſaid that he ſaw the defendant offer 40*s.* which he called a modus, *or ſomething of that ſort;* not ſpeaking with any certainty to the defendant having inſiſted upon it as a modus. And as there was no evidence to prove that the modus was actually inſiſted upon before the action; and this was a penal action; it now ſeemed to the learned Judge that no denial of the plaintiff's title at the trial could affect the defence upon the want of notice, ſince the penalty could only be incurred at the time when the titheable ſubjects were removed, at which time the compoſition was in force, and the defendant had a right to do the act. Notwithſtanding this report, however, the plaintiff's counſel ſtill inſiſted that, though there was no evidence given at the trial of a formal notice from the plaintiff to the defendant to determine the compoſition; yet that it was to be collected from other facts proved at the trial, that the defendant had notice of the determination of the compoſition long before 1808; for not ſetting out the tithe of which year this action was brought. It was therefore referred back to the learned Judge to report the evidence in pleno, which had not been at firſt conſidered to be neceſſary, for the purpoſe of raiſing the objection on which the rule had been moved,

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1810.

Fell, Clerk, *against* Wilson.

for. And now, upon reading the further report, it appeared that there had been a demand by the plaintiff of his tithe vicarial from the defendant in 1806, when the defendant tendered 40*s*., which the plaintiff refused to take; and it was upon this occasion that the witness said the defendant called it a *modus, or something of that sort*. That the plaintiff afterwards went again to demand tithe in kind of the defendant in 1807, when only the defendant's wife was at home; but in fact no composition had been received for the last two years antecedent to bringing this action.

Park, Topping, and *Holroyd*, in shewing cause against the rule, insisted upon the facts last reported, as evidence that the vicar had determined the composition by a regular notice, (and a parol notice is at any rate sufficient,) supposing a six months notice to be necessary in order to determine a composition: but they intimated doubts whether that were the point in judgment in the case of *Hewitt* v. *Adams* in the House of Lords. The question there put was, whether the particular notice given on the 8th of *September* to determine a composition for tithes ending on the 28th of the same month were good; which the Judges held to be insufficient.

Lord Ellenborough C. J. Both law and convenience require that *some* notice at least should be given to determine a composition of tithe; and if some notice be to be given (which is not denied) it ought to be an unequivocal notice, that the party may know upon what he is to depend. But the question here is, whether any notice at all has been given? Now I cannot collect that, from the mere refusal to take the 40*s*. tendered by the defendant. Where there has been an habitual money payment, the

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mere demand of tithe by the vicar might mean of that which had been ufed for a feries of years to be accepted by him for tithe. He ought to have explained himfelf further if he meant to put an end to the compofition. If he had demanded his tithe *in kind*, that would have been unequivocal. Then, when the plaintiff refufed the 40*s*. tendered by the defendant, that might have been becaufe there was more than one year due, or becaufe they might have entered into another compofition. The plaintiff fhould have explained what he meant; whether he meant to refufe to accept any compofition at all; for it lay upon him to prove that the former compofition was put an end to: and if a party will reft on a verbal expreffion of his meaning, when it is certainly more convenient that it fhould be reduced to writing, at leaft the verbal notice fhould be unequivocal, and not reft upon a converfation which will bear different meanings.

GROSE J. faid it would be very inconvenient if fuch loofe evidence were admitted to determine a compofition of fo long ftanding.

LE BLANC J. It is clear from the opinion delivered by the Judges in the cafe referred to in the Houfe of Lords, of *Hewitt and others* v. *Adams*, that they thought *fome* notice was neceffary to determine a compofition for tithe. The queftion put to them did not require their opinion as to the length of time of the notice; and therefore the anfwer given by them fatisfied the queftion put to them, that the particular notice which had been given was not fufficient. But Mr. Juftice *Buller*, who was one of the Judges concurring in that anfwer, ftated afterwards, in the cafe which has been mentioned of *Wyburd* v. *Tuck*, the grounds on which the Judges proceeded who

1810.

FELL, Clerk, *against* WILSON.

had concurred in that opinion. Now here the evidence is that in 1806 the plaintiff demanded of the defendant in perfon his tithes vicarial: that we muft underftand as a demand of the amount; and at the fame time 40*s*. was tendered by the defendant; which was refufed to be accepted by the plaintiff, but on what account was not explained by him. Then again, in 1807 there was another converfation, but nothing was faid of taking tithes in kind. Can that then be confidered as a notice to quit given at that time? If fo, it muft have operated on both parties. But if the vicar in the next year had demanded the compofition, and the farmer had infifted that he had determined the compofition the year before, and that he would only give him his tithes in kind; it would have been no anfwer for the farmer to have faid, that becaufe the vicar had refufed to receive the compofition the preceding year, that operated as a notice to determine it. Therefore by analogy to other cafes of notice to quit, we cannot conftrue a mere general demand of tithe, and a refufal to take the fum tendered, which had been before received by the vicar, to be a determination of a fubfifting compofition.

BAYLEY J. There is no evidence that the compofition was determined. The plaintiff demanded of the defendant his vicarial tithes: that rather feemed to be a demand of fomething *immediate*, and looked more to a money payment than to tithes in kind: and there was no demand of tithe in kind in future. Then the evidence is that the defendant offered him 40*s*., fhewing that in his (the defendant's) underftanding it was a demand of money, and that 40*s*. was all that was due. The vicar, however, refufed it; but that might be becaufe he thought that more than one year's compofition was due. He leaves

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this unexplained: and I do not think that it can be inferred from thence, that it was a notice from the vicar that *in future* he should take his tithe in kind. I have said thus much, not as supposing that I have added any thing to the reasons assigned by the rest of the Court for their opinion, but lest it should be imagined that I do not fully accord with my Lord and my Brothers in what they have said. But I would wish it to be understood, that when I accede to the judgment of the Court, without assigning my own reasons, it is because I fully agree in those which have been before assigned by my Brothers.

Rule absolute.

MAX *against* ROBERTS and Others.

Monday, Feb. 5th.

A count in an action on the case, stating that the defendants, being owners of a ship at *Liverpool* bound on a voyage *from thence to* Waterford, the plaintiff *shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at* W. to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from *L* to *W.*; and then averring that it was *the duty* of the defendants as such owners to cause the ship to proceed on the voyage *from* L. *to* W *without deviation*; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c.; cannot be sustained, for want of alleging that *the goods were delivered to or received by the defendants* for the purpose of carriage, or *that they had notice of the shipment*; from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred: and also for want of an allegation, that the defendants *undertook* to carry the goods *directly to* W. *from* L.; for though the ship's ultimate destination might be *W.*, yet she might have been first destined to other places on a coasting voyage.

THE plaintiff brought his action on the case in the Court of Common Pleas against the defendant *Roberts*, and eight other defendants, of whom *John Ames* and *Jane* his wife were two; and declared against them in his first count, that whereas they were the owners of a ship called the *Draper*, which ship before the time of the grievance after mentioned, viz. on 25th of *April* 1805, was lying in the port of *Liverpool*, and bound upon a voyage from thence to *Waterford* in *Ireland*; *and being so bound upon the said voyage*, one *J. T. shipped on account of the plaintiff*

1810.

Max *against* Roberts and Others.

in the faid fhip ten hogfheads of fugar, of the value of 375*l.* *to be carried upon the faid voyage by the defendants, and to be delivered at* Waterford *aforefaid* (the dangers of the feas excepted) *to the plaintiff or his affigns*, he or they paying freight for the faid goods 20*s.* per ton, &c.; and thereupon the faid *J. T.*, *as the agent of the plaintiff*, caufed to be underwritten a policy of affurance *of the faid ten hogfheads* of fugar valued at 375*l.* *at and from* Liverpool *to* Waterford *aforefaid;* by which policy the underwriters took upon them in that voyage the perils of the fea, &c. And then the plaintiff averred that the faid hogfheads of fugar, being fo loaded on board the faid fhip for the voyage aforefaid, *it became and was the duty of the defendants, as fuch owners* as aforefaid, *to caufe the faid fhip to proceed upon the faid voyage from* Liverpool *to* Waterford *aforefaid, without making any unneceffary deviation from the courfe of the faid voyage:* yet the defendants not regarding their faid duty as fuch owners of the faid fhip, but neglecting the fame, *did not caufe the faid fhip to proceed* upon the faid voyage from *Liverpool* to *Waterford, without making any unneceffary deviation* from the courfe of the faid voyage, but on the contrary thereof, afterwards, and after the faid fhip had failed on her faid voyage, and before fhe completed the fame, the defendants wrongfully fuffered her to make an unneceffary deviation from the courfe of the faid voyage from *L.* to *W.* with the faid hogfheads of fugar on board as aforefaid, viz. from and out of the courfe of the faid voyage into *Portwilliam Bay*. And that afterwards, and whilft the faid fhip remained in the faid bay with the faid hogfheads of fugar fo on board, fhe was by the dangers of the feas, &c. funk; by reafon whereof the faid hogfheads of fugar of the faid plaintiff fo on board were deftroyed. Whereupon the plaintiff,

plaintiff, but for ſuch deviation of the ſaid ſhip from and out of the courſe of the ſaid voyage, might and would by law have recovered payment of his damages ſo by him ſuſtained by ſuch loſs, by virtue of the ſaid policy of inſurance: but by reaſon and means of ſuch deviation in the ſaid voyage as aforeſaid, and on no other account whatſoever, the ſaid inſurance ſo as aforeſaid made on the ſaid hogſheads of ſugar, became and was avoided and of no avail, and the ſaid underwriters became and were exonerated and diſcharged from all ſums that would otherwiſe have been due and payable from them under their ſaid inſurance, for and in reſpect of the ſaid loſs ſo ſuſtained by the plaintiff as aforeſaid; *and in conſequence thereof the plaintiff failed in the recovery* of the ſaid ſums of money in certain actions brought by the ſaid *J. T.* as agent of the plaintiff as aforeſaid, for and on account of the ſaid plaintiff, againſt the ſaid underwriters on inſurances, viz. againſt one *D. M.* &c., without knowing or being appriſed of ſuch deviation as aforeſaid, and became liable to pay and did in fact pay divers ſums, to wit, 500*l.* for and in reſpect of the coſts and charges as well of the defence of the ſaid *D. M.* &c. of ſuch actions, as of the proſecution thereof by the ſaid *J. T.*, the agent of the plaintiff aforeſaid. There was a ſecond count ſtating the circumſtances in a ſimilar manner, and alleging *that it was the duty of the defendants* (in reſpect thereof), *as ſuch owners of the ſaid ſhip, to have made ſuch voyage by and according to the direct, uſual, and cuſtomary way and paſſage, without deviation or departure from, or delay or hindrance in, the ſame,* without reaſonable or ſufficient cauſe for ſo doing, *in order that the plaintiff,* ſo being ſuch proprietor of the ſaid hogſheads of ſugar, and *having cauſed ſuch aſ-*

ſurance

1810.

MAX *against* ROBERTS and Others.

surance to be made thereon, might not lose the benefit of such assurance. And then it proceeded to allege as a breach, that the defendants did not make such voyage with their said ship by and according to the direct, usual, and customary passage, without deviation, &c., but wrongfully deviated from the direct, usual, and customary passage, &c.; and so concluded as the former count.

To this declaration three of the defendants pleaded not guilty, and the rest (including *John Ames* and *Janet* his wife) suffered judgment by default. And the cause went down to be tried at Guildhall, in C. P., before the Chief Justice, upon the issue between the plaintiff and the three defendants who pleaded to issue, and to assess the plaintiff's damages against the six other defendants who suffered judgment by default. The jury found the three defendants who pleaded to issue, not guilty; and assessed damages and costs against the six defendants who suffered judgment by default. The plaintiff thereupon entered a noli prosequi as to the husband *John Ames*, and *Janet* his wife, two of those six defendants, and prayed his judgment against the remaining four defendants. The judgment of the Court of Common Pleas thereupon was, that the plaintiff should take nothing by his writ, &c.; upon which judgment the plaintiff *Max* brought a writ of error, and assigned for error, that judgment ought to have been given for him to have recovered against the four defendants his damages assessed by the jury against them. To which assignment of error all the original defendants (except *John Ames* and his wife, in respect to whom a noli prosequi had been entered) pleaded in nullo est erratum.

This

1810.

MAX *against* ROBERTS and Others.

This writ of error was twice argued: the firſt time in this court in *Mich.* 49 *Geo.* 3. by *Taddy* for the plaintiff, and *Parnther* for the defendants; and the ſecond time in the Exchequer Chamber before all the judges, by the *Attorney-General* for the plaintiff, and *Lawes* for the defendants. The argument turned principally upon the queſtion, whether in an action on the caſe, which is laid in tort againſt two or more, founded upon the alleged breach of a joint contract, one or more of the defendants may be found guilty and the others acquitted, according to the doctrine of this Court in *Govett* v. *Radnidge and Others* (3 *Eaſt*, 62.); conſidering the tort or breach of the duty reſulting from the contract to be the gift of the action, and not the contract itſelf out of which it aroſe: or whether, as the Court of C. B. decided in *Powell* v. *Layton* (2 *New Rep.* 365.), the contract be the gift of the action, as well when declared on in an action on the caſe for a tort in the breach of the duty reſulting from it, as in aſſumpſit upon the promiſe and undertaking expreſſed or implied in the terms of the contract itſelf, in which view a defendant ſued alone in an action on the caſe might plead in abatement that he had contracted jointly with others. The caſe was argued at much length; and a difference of opinion was underſtood to prevail amongſt the judges upon the queſtion; but as the principal authorities are collected in the reports of the two conflicting caſes, and the judgment now delivered turned upon a collateral point; and as another caſe is now depending in this court (*a*), in which the ſame point is intended to be raiſed, it is unneceſſary here to recapitulate the arguments. In this term,

Lord ELLENBOROUGH C. J. after ſtating the record, as above ſet forth, proceeded—This writ of error, after

(*a*) *Weall* v. *King and Another*.

having

1810.

MAX
against
ROBERTS
and Others.

having been twice argued here, was adjourned into the Exchequer Chamber; as it was fuppofed that a decifion in this cafe might fettle and put at reft a queftion upon which contrary judgments had lately been given in this court and in the Common Pleas. The judgment of this Court was in the cafe of *Govett* v. *Radnidge and Others*, 3 *Eaft*, 62., and that of the Common Pleas in *Powell* v. *Layton*, 2 *New Rep.* 365. And it has fince accordingly been argued by counfel before the twelve judges in the Exchequer Chamber, and then, and at a further meeting held for the fame purpofe, fully confidered by them: and upon fuch confideration they were unanimoufly of opinion that both the counts of this declaration are fo defective in feveral material refpects, (perfectly collateral to the grounds of objection argued, and upon which the determination of the Judges was fought,) that no judgment could be given for the plaintiff upon either of them: the main queftion, upon which the determination of the Judges was fought, being (it will be recollected) whether a verdict could confiftently with the rules of law be given, acquitting fome defendants, and finding others guilty, in fuch an action as the prefent. The firft count of the declaration alleges a fhipment by the plaintiff of goods on board a veffel, of which the defendants are ftated to be owners; but it does not proceed to ftate that fuch goods were delivered to or received by the defendants, or that the defendants in any manner ever had notice of the fact of fuch fhipment. So that in this count there is not only a want of any words importing a promife by the one party to the other, but there is alfo an entire abfence of all circumftances or facts from which any promife or agreement could be implied, or duty inferred between them in refpect to fuch goods. Neither is it alleged in either of the counts (which would have been further ne-

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1810.

MAX *against* ROBERTS and Others.

ceffary, fuppofing a delivery of the goods in queftion to the defendants, and an acceptance by them for the purpofe of carriage had been charged,) that the defendants undertook to carry the goods *directly* for *Waterford*; becaufe independently of any reftraint upon the fhip-owner, arifing from agreement on the fubject, the fhip may make as many intermediate refts and ftages in the courfe of its voyage, (and in the cafe of coafting voyages, or voyages to places near home, it ufually does fo,) as the ordinary convenience of its employers and nature of its fervice may require. Upon a record, therefore, fo effentially defective as this is in the particulars I have mentioned, it is enough to fay that we, together with all the other judges, were of opinion, that the judgment given below, which was that the plaintiff fhould take nothing by his writ, was properly given: and of courfe that it is fit that the judgment there given for the defendants in error fhould be affirmed by us.

Judgment affirmed.

1810.

Monday, Feb. 5th.

DOE, on the several Demises of J. HAYNE, of His Majesty King GEORGE III., and of Others, *against* ELIZABETH REDFERN, Widow.

The stats. 8 *H.* 6. *c.* 16. & 18 *H.* 6. *c.* 6., prohibiting the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case, without office, neither can the plaintiff in ejectment recover upon the demise of the crown.

And the 8th sect. of stat. 2 & 3 *Ed.* 6. *c.* 8. (which is in general terms and not confined to the particular inquisitions mentioned in other clauses of the act) extends to avoid any such inquisition or office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expresly found their ignorance of the tenure: and a melius inquirendum shall be awarded.

Quære, Whether at common law, upon the death of the tenant last seised of the land, without heirs, the right and possession must be presumed to be immediately in the crown, without office, as though the person last seised were the king's immediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised.

THIS ejectment was brought on the several demises of *John Hayne*, deceased, the king in right of his crown, *Elizabeth Hayne*, widow, and *T. Bolton*, as executrix and executor of the said *John Hayne*, and the said *Eliz. Hayne* as executrix of the said *John Hayne*, to recover a messuage and 33 acres of land in the possession of the defendant, situated at *Clifton* in the parish of *Ashborne*, in the county of *Derby*. At the trial before *Bayley* J. at *Derby*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

By indentures of lease and release of the 1st and 2d of *April* 1737, *Rd. Taylor* conveyed the premises in question to *Roger Johnson* and *Elizabeth* his wife, and to the heirs of the said *Roger Johnson*, to hold the same unto the said *Roger Johnson* and *Eliz.* his wife, and the heirs of *Roger Johnson* for ever, of the chief lord or lords of the fee, by the rents and services due and of right accustomed. By virtue of which *Roger Johnson* entered thereon, and died seised thereof without heirs on the 28th of *August* 1740.

Eliz.

1810.

DOE, Lessee of HAYNE and HIS MAJESTY, against REDFERN.

Eliz. Bradbury (called in the said deed the wife of *Roger Johnson*, but not being in fact his wife) died on the 23d of *Jan.* 1791. By a commission of escheat, dated 17th of *June* 1794, directed to certain commissioners therein named; reciting that it was understood that the said *Roger Johnson* was born a bastard, and died without lawful issue, and that he was at the time of his death seised in fee simple or otherwise of certain lands in the county of *Derby*; the commissioners were authorized to inquire, as well by the oaths of good and lawful men of the said county, and the examination of witnesses upon oath, as otherwise, whether the said *Roger Johnson* was a bastard, or not, and whether he died without lawful issue, or not, and on what day and year, and where he died, and what lands and tenements, and of what annual value, he had in the said county at the time of his death, *and of what person or persons the same were holden, and by what services*, and what estate or interest he had therein, and in whose hands they then were, and who had taken and received the mesne profits thereof since his death, and to what amount, and also of all other matters and circumstances which they should judge fit and necessary to be inquired of touching the matters, &c. An inquisition was taken under and by virtue of the above commission on the 25th of *July* 1794, before *Daniel Parker Coke*, *John Balguy*, and *Nathaniel Goodwin Clarke*, Esqrs., three of the commissioners; when it was found by the jury, that *Roger Johnson* was not a bastard, and that at the time of his death he was seised of the remainder in fee expectant on the death of *Eliz. Bradbury* of and in the premises in question under the indentures of lease and release before mentioned; and that he died in *August* 1740, without any heir of his body or any right heirs capable of enjoying the

1810.

Doe, Lessee of Hayne and His Majesty, *against* Redfern.

the premises; and that the premises were at his death of about the yearly value of 28*l.*; and that the rents of part of the premises then in the possession of *Halksworth*, and of the yearly value of 20*l.*, had been received by *Elizabeth Bradbury* from the time of the death of *Roger Johnson* until her death on the 23d of *January* 1791, and since that time the same had been received by *John Redfern* of *Derby*; and that a close, the residue of the said premises, then in the occupation of *T. Bradbury*, had been possessed by him since the death of *Roger Johnson* without any rent paid for it to any person, and that the whole of the premises were then in the possession of *J. Halksworth* and *T. Bradburn*. But it was not found *of what person or persons the premises were holden*, nor *by what services*. The above inquisition was duly sealed and returned. The person who was in possession as tenant at the time the inquisition was taken attended as a witness by the desire of the defendant, who is the widow of the said *John Redfern*; and Mr. *Simpson*, an attorney, (now deceased) also attended the inquisition on behalf of the defendant, and cross-examined witnesses. By indenture of lease under the Exchequer seal, dated the 17th of *April* 1807, his majesty demised and granted to *John Hayne*, his executors, &c. the premises in question, to hold from the 5th of *April* 1797 for the term of 31 years, under the yearly rent therein mentioned. The said *John Hayne* died in *January* 1808, having by his will appointed his widow *Eliz. Hayne* and *Thomas Bolton* executrix and executor thereof; and the will was duly proved by *Eliz. Hayne*. If the plaintiff were entitled to recover, the verdict was to be entered accordingly: otherwise, a verdict was to be entered for the defendant. The case was argued in the last term.

1810.

DOE, Lessee of HAYNE and HIS MAJESTY, against REDFERN.

Balguy jun. for the plaintiff. The first objection made to the inquisition, by the defendant, is, that the return does not find *of whom, and by what services, the lands were holden*, and is therefore avoided by the stat. 2 & 3 *Ed.* 6. *c.* 8.: and another objection made is founded on the stats. 8 *H.* 6. *c.* 16. and 18 *H.* 6. *c.* 6. avoiding grants of lands seised into the king's hands before office found and returned, &c. for a month, &c. But the plaintiff's claim under the crown may be supported, independently of those acts, upon general principles. For, 1st, It is a maxim of law that all lands and tenements are holden mediately or immediately of the crown. *Co. Lit.* 1. and *Wright's Tenures*, 58, 9. 136. [This was not disputed.] 2dly, It follows of course that in the absence of proof of any mesne tenure, the presumption of law is that lands are holden immediately of the crown: and, 3dly, It also follows upon the principles of the common law, that where the king's tenant dies without heirs, the lands of which he died seised vest immediately in the crown, before office found, if there be no statutable provision to the contrary. [These positions being also admitted; Lord *Ellenborough* C. J. said: Are we to take it for granted that in the absence of proof of any mesne tenure the presumption of law is that the lands are holden immediately of the crown, so as to vest in the king, without office found, upon the death of the tenant last seised without heirs, when in this very case a commission has issued for the purpose of inquiry, amongst other things, *of what person or persons the lands were holden*; which commission issues, because the king is in doubt of the matter, and for the purpose of clearing that doubt?] The only objection made is upon the statutable provision of the 2 & 3 *Ed.* 6. *c.* 8. "an act for finding of offices before es-

 "cheators,"

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

"cheators," which enacts (s. 8.) "that where any inquisi-"tion or office shall be founden by these words, or like, "*Quod de quo vel de quibus tenementa prædicta tenentur jura-"tores prædicti ignorant*; or else founden holden of the "king *per quæ servicia ignorant*, or such like; that in such "case such tenure so uncertainly founded, *de quo vel qui-"bus tenementa prædicta tenentur ignorant*, shall not be "taken for any immediate tenure of the king; nor such "tenure so founden of the king, *per quæ servicia ignorant*, "shall not be taken any tenure in capite; but in such "cases a *melius inquirendum* to be awarded, as hath been "accustomed in old time; any usage of later time to the "contrary notwithstanding." These words indeed are general, but they must be construed with reference to the whole scope of the act; and the inquisitions mentioned in that clause must be taken to relate and be confined to the inquisitions and offices mentioned in the other clauses, and not to extend to *all* inquisitions in general. The 2d and 3d clauses extend only to protect chattel and copyhold interests, and persons having interests in rent, common, or profit apprendre, for term of years, life, or otherwise, out of any lands, &c. contained in any office or inquisition where the king is entitled to hold such hands. The 4th and 5th clauses protect the heirs of the king's tenants found to be of less age than they really are. The 6th section gives a traverse to the true heir or party grieved against untrue offices found in respect to the heirship, lunacy, ideocy, or death of parties interested. The 7th section gives a traverse or monstrans de droit, to the party interested against untrue inquisitions of treason, felony, or præmunire, giving title by double matter of record to the king. It is to these several inquisitions only that the general provisions in the

8th

8th clause must be taken to apply. But then it is objected, that by the stat. 8 *H.* 6. *c.* 16. "No lands seised "into the king's hand upon such inquest taken before "the escheators or commissioners shall be in any wise let "or granted to ferm by the chancellor or treasurer of "*England*, or any other the king's officer, *until the same* "*inquests and verdicts be fully returned* in the Chancery or "Exchequer; *but all such lands shall entirely and continu-* "*ally remain in the king's hands until the said inquests and* "*verdicts be returned, and by a month after the same return;* "if it be not so that the parties grieved by the same in- "quests or putting out of their lands come into the "Chancery and proffer themselves to traverse the said "inquests, and then offer to take the same lands to ferm: "and if they do so, that then the same lands be com- "mitted to them, if they shew good evidence proving "their traverse to be true, after the form of the stat. "36 *Ed.* 3. *st.* 1. *c.* 13., to hold until the issue taken "upon the same traverse be found for the king," &c. But this statute applies not to cases where the king is in possession before office found, as upon the death of his own tenants in capite without heirs; but only to cases where an inquest is necessary to perfect the king's title, as in cases of forfeiture, or entry for condition broken. The preamble of the 8 *H.* 6. speaks of the *disherison* of the subject by means of the irregular and wrongful inquests taken by escheators, by which the lands of persons had been seised into the king's hands and let to farm before such inquests returned: but that cannot apply to a case where there are no heirs of the tenant last seised; and where the king is so completely in possession before office found that he may maintain a writ of intrusion against any who disturb him. The stat. 18 *H.* 6. *c.* 6.

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

does not carry the objection further; it recites the stat. 8 *H.* 6. giving to the party grieved his traverse, and the evasions of it; and then it avoids all grants of lands seised, &c. before inquisition found and returned into Chancery or the Exchequer for a month, unless such grants be made to those who have tendered their traverses as provided for by the former act: but that must still be understood of such cases where the inquest of office is necessary to entitle the king to enter, and not merely to notify to him the locality and value of the lands, which, having been held by his own immediate tenant, vested upon his death, without heirs, in possession in the king. 16 *Vin. Abr.* 79. Office, B. mentions two sorts of offices; one which vests the estate and possession of land in the king where he had only a right or title before; and which is called "office of instituting;" of which the instances put are of purchases in mortmain, or by an alien, villein of the king, or felon: the other, which is called the "office of instruction;" which is where the estate is lawfully in the king before, but the particularity of the land does not appear of record; as in case of attainder for high treason under the stat. 33 *H.* 8. *c.* 20.; or if the king's own tenant commit felony, and be attainted and die: in these and other such cases, says the book, (which must include the death of the king's tenant without heirs) *the estate is in the king, without any office.* For this is cited *Page's* case, 5 *Rep.* 52. and a note is subjoined from *Gilb. Hist. Exch.* 132—4. in which it is stated that the king's officers may not enter upon any *other* man's possession till the jury have found the king's title: but that where the king's title appears of record, his officers may enter without any office found; *as where the lands are held of the crown, and the tenant dies without heir.* And *Yonge* v. *Conway*,

Conway, *Salk*. 7. is to the same purpose. [Lord *Ellenborough* C. J. As all lands are held mediately or immediately of the crown, must not that passage in *Gilbert* be understood of lands which already appear by matter of record to be held immediately of the crown? In the case in *Saville* the party is stated to have held of the crown in capite. But here is another person in possession, not having paid rent to the crown, whose possession must therefore be presumed to be adverse, and may turn out to be a legal one; or there may be a mesne lord. The inquiry is directed to ascertain these matters.] There was sufficient evidence to warrant the jury in finding that the tenant last seised, who died without heirs, held immediately of the king, in the absence of all proof to the contrary. [*Le Blanc* J. Then that fact ought to have been so found in the inquisition. If it be a presumption of law that the tenant last seised held immediately of the king, unless the contrary be shewn, then the jury would have been warranted in finding the fact; but they have not found it. *Bayley* J. When there is a proper office found, that is notice to all persons who have claims to assert them, and the mesne lord, if any, may then come in and claim: it is an inquisition in rem: but an ejectment, which is only to recover a chattel interest, is no notice to the mesne lord or to any other persons.] He then adverted to the demise laid from the king: but *the Court* said, that the question was the same upon that demise as upon the demise of the king's grantee.

Copley contrà admitted, that upon the death of the king's tenant, without heirs, the king is taken to be in the actual possession of the land before office found: and though the inquisition does not find that the tenant last

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

seised who died was the king's immediate tenant, and therefore he was entitled to avail himself of that omission; yet he was prepared, he said, to argue the case upon the supposition that, in the absence of any proof to the contrary, the presumption of law was that every person held immediately of the crown; and still he contended that till office found the king could not grant the estate to another by force of the statutes referred to. *Staunford* (*Prerogative*, *fo.* 54.), speaking of the king's seisin, possession, or title, says, that there may be a possession in law in the king as well as a possession in deed, which possession *in law* is ever without office or other matter of record; as when possession is cast on the king by descent, reverter, remainder, or *escheat*: and the king, he adds, may make it a possession *in deed* by *entry* or *seisure*; but *not* to make it a possession in deed *by his grant*, because of the stat: 18 *H.* 6. *c.* 6., which avoids *all* letters patent made of lands before office found and returned, or within one month after, but only to him that tendereth his traverse: and yet, he says, the seisin remains in the king as at common law, though not in deed, until such time as he had made a seisin or entry by his escheator, or a grant thereof, which waiveth both to a seizure and grant, in such cases where the grant may be good, and not restrained by statute. For an office that entitleth the king to the possession is sufficient by itself, without any seizure or entry of the escheator, to make a possession in deed in the king, *if the possession were vacant when the office was found. But if the possession were not vacant, but another than he in whose right the king seizeth was tenant thereof at the time of finding the office, then must the king enter or seize by his office before the possession in deed shall be judged in him.* And this is not inconsistent with the

doctrine

doctrine in *Willion* v. *Berkley* (a), that if the king's tenant die without heir, the freehold and possession *in law* is presently in the king, without office. But the same distinction is recognized in *Bro. office devant Escheator*, *pl.* 56. (which cites 29 *H.* 8.), that if the king grant land for life, and afterwards the grantee die; yet the king cannot grant this over until the death be found by office; and this by the stat. 18 *H.* 6. So also in the case of attainder for high treason, the actual possession and seisin of the land is by stat. 33 *H.* 8. *c.* 20. *s.* 2., in the king before office; yet until office found and returned, &c. or something equivalent, it was questioned in *Dy.* 145. *b.*, whether a grant by the king of the forfeited land were not within the prohibition of the stat. 18 *H.* 6. In *Saville*, 70. where the queen granted a lease (b), with a proviso to be void if the rent reserved were in arrear for 10 days, *Manwood* held, that though the freehold were in the queen, yet she could not make a lease or grant thereof without office found and returned; and that, by the stat. 18 *H.* 6. *c.* 6.; quod fuit concessum per totam Curiam. And the Court further held that an office found and returned afterwards would not make an intermediate lease good by relation. Other instances are stated in *Bro. office devant Escheator*, *pl.* 14., and *Fitz. Abr. Graunt. pl.* 91., where though the possession shall be deemed in law to be in the king before office, yet he cannot grant till office found and returned, by the 18 *H.* 6. *c.* 6. It is contended, however, that an office has in effect been found in this case for the king,

(a) *Plow.* 229.

(b) The report states the lease to have been for 20 years, and yet supposes the principal question made by the Court to have been, Whether *the freehold* were in the queen The question more probably made was, Whether, the freehold being in the queen, she could, by virtue of the proviso avoiding the lease, upon the mere non-payment of the rent for 10 days, re-grant or re-demise without office found.

because

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

because as it is not found in the inquisition that the lands were holden of any intermediate lord, the presumption of law is that they were holden immediately of the king. But such a presumption could not have been made even at common law from the mere silence of the inquisition, nor would it from thence have been taken to have been an immediate tenure of the king in chief, but a melius inquirendum would have issued: a fortiori since the statute. *Dy.* 155. *b.* 292. *a.* *Co. Lit.* 77. *b.* 2 *Inst.* 693. *Register*, 293. *b.* *Inche* v. *Roll.* *Hob.* 50. *Barham's case*, *Ley.* 23. *Milner's case*, *ib.* 29. There is nothing then in principle to limit the construction of the stat. 2 & 3 *Ed.* 6. *c.* 8. *s.* 8. to any particular kinds of office, and the words of that clause are general, extending to "any inquisition or office," and directing a melius inquirendum to be awarded if the jury return *ignorant* as to the person of whom or the services by which the tenement was holden; and expressly declaring that the tenure so uncertainly found shall not be taken for any immediate tenure of the king. Lord *Coke* (*a*) says that this was but a declaration of the common law, and calls it a right profitable statute, and beneficial for the subject. And no limitation has been put on these words in any case, which would probably have occurred if they had not been always considered to be general. Then nothing having been found in this inquisition, of whom and by what services the lands were holden, it is the same as if the jury had found *ignoramus* (*b*).

Then as to the demise from the crown; it has been doubted whether the king can maintain an ejectment; but at any rate the stats. of *H.* 6. preclude the king from letting or granting to farm until, &c. The action of

(*a*) *Co. Lit.* 77. *b.* (*b*) *House's case*, *Cro. Jac.* 41.

ejectment

1810.

Doe, Lessee of Hayne and His Majesty, against Redfearn.

ejectment by the king supposes him to have been turned out of possession, which cannot be; for if he be entitled at all, he is presumed to be in possession: and though ejectment be a fictitious proceeding, yet it must be consistent throughout, and the lessor must not only have in himself, but be capable of conveying to the plaintiff, a legal interest. So an intruder is not supposed to put the king out of possession; and therefore if the king have judgment on an information of intrusion, no habere facias seisinam issues. Again, the judgment in ejectment is that the tenant recover his term; but the king had no power to grant the term; and the writ of possession would operate to make the tenant an intruder upon the king's possession. Besides, the policy of the acts would be evaded, if *Hayne*, though the grant to him were void, could make use of the king's name to recover the possession in ejectment. And, lastly, it is not found that the person last seized was the tenant of the king.

Balguy jun. in reply. The acts of *Hen.* 6. speak throughout of lands seized into the king's hands *by inquest* before escheators; and therefore cannot apply to a case where the king is not in by inquest. The case in *Saville* 70. was one of a condition broken and forfeiture; and as entry would have been necessary to have entitled a subject, so office was necessary to entitle the crown. The case of the king's ward was where the ward having lawful possession, office was necessary to give title to the king till the ward came of age. But the case of an escheat is very different from that of a forfeiture: an escheat, according to Mr. Justice *Wright* (*a*), imports in its legal sense "something happening or returning to the lord

(*a*) *Law of Tenures*, 117.

upon

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

upon a determination of tenure only," and is properly feudal; and it is diftinguifhed by him from forfeitures, which accrued to the king at common law upon the commiffion of treafon, before the introduction of tenures. 2 *Inft.* 164. is to the fame effect. And in this cafe of efcheat, the king is in poffeffion immediately on the death of his tenant without heirs, before office found. The acts of *Hen.* 6. apply only to cafes of expulfion; and that of *Ed.* 6. is confined to the particular inquifitions there mentioned, of which this is not one. Then as to the plaintiff not being able to maintain ejectment upon the demife of the king, by reafon of the ftats. of *Hen.* 6., thofe ftatutes only extend to avoid the king's grant by letters patent in the cafes to which they apply; but the Court will take notice that the leafe to *John Doe* is merely fictitious, for the purpofe of trying the title, and could not have been in the contemplation of the legiflature. [*Bayley* J. Can the king convey any intereft in the land except by matter of record? and muft we not prefume upon this record that *John Doe* had a term granted to him?] The defendant, by entering into the rule to confefs leafe entry and oufter, admits that the king has demifed. [*Le Blanc* J. The defendant admits a demife in fact from the king, but he does not admit that the demife is good in law.]

Lord Ellenborough C. J. The Court will look into the acts which have been referred to before they deliver their final opinion upon a matter fo feldom brought into judicial confideration. If the provifion in the 8th fection of the ftat. of *Ed.* 6. be general, it decides the queftion, and there muft be a writ of melius inquirendum awarded: and at prefent it does not appear to me that the words are fufceptible of the reftriction which has been

been argued for. But perhaps the admission which has been made by the defendant's counsel, that the right of possession must be presumed to have been in the crown immediately upon the death of the tenant last seized, without heir, without office found, nothing appearing to the contrary, may be found to have been made rather too largely.

The case stood over for consideration till this term, when his Lordship now delivered the opinion of the Court. —This was an ejectment on three demises, first, of *John Hayne*, deceased; secondly, of the king; and thirdly, of *Hayne*'s executors; and the claim of the lessors of the plaintiff was under an escheat. [Then, after stating the facts of the case.] Upon these facts it was admitted, that the right and possession were in the king immediately upon *Eliz. Bradbury*'s death. But it was contended, 1st, That under the statutes of 8 *H.* 6. *c.* 16., and 18 *H.* 6. *c*, 6., the king was restrained from granting *until after office found*. 2dly, that as the inquisition in this case did not state *of whom* the lands in question were holden, it was a bad inquisition, and could not support the grant to *Hayne*. And, 3dly, that if that grant be bad, the count upon the king's demise cannot be supported; because that demise is to be considered as a grant. The position, that the right and possession were in the king immediately upon *Eliz. Bradbury*'s death, is not perhaps quite so clear as has been supposed; and the admission to that effect would probably not have been made, had not the defendant's counsel felt confident upon the other points. There is nothing upon any record to shew any title in the crown: nor has the possession been vacant from the

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

moment of *Eliz. Bradbury's* death: and whenever the king's right, without office, comes under discussion, those may be found important considerations. The cases of the king's tenants in *capite*, and his other known tenants, bear no analogy to this case; because there the tenure was of record, and upon the tenant's death the king was intitled to take seisin of the land, and to receive the profits to his own use, till the heir appeared to claim the land and receive investiture: and if the heir were under age, the king was entitled to wardship; if of full age, to primer seisin or relief: and if there were no heir, the king's seisin was of course indefeasible. These cases, therefore, in which the tenure under the king was recorded, and in which the seisin devolved upon him on his tenant's death, conclude nothing in a case in which no tenure is recorded, and in which it is wholly uncertain under whom the tenure is. [His Lordship mentioned the Sadlers Company's case, 4 *Rep.* 58. *a.* *Willion* v. *Berkeley*, *Plowd.* 229. *Nichols* v. *Nichols*, *Plowd.* 481. *Gilb. Exch.* 110. (133.) and *Staunf. Prerog.* 53. *b.* 54. *a.*; as authorities which might be referred to upon this point.] Without proceeding further, however, upon this point, or intimating any thing like a decided opinion upon it, but merely protesting against giving an unqualified assent to the admission by the defendant's counsel, we will proceed to the other points. The first, that the king cannot grant before office, depends on the two statutes of *Hen.* 6. The stat. 8 *Hen.* 6. *c.* 16. states as a grievance, (among others) that the lands and tenements of many of the king's liege people are seized into the king's hands upon the inquests of escheators, or let to farm by the treasurer or chancellor, before such inquests are returned; and to

remedy

remedy that grievance, it provides that no lands nor tenements, seised into the king's hands upon inquest before escheators or commissioners, be in anywise let or granted to farm by the chancellor or treasurer of *England*, or any the king's officers, until the same inquests and verdicts be fully returned into the Chancery or Exchequer; but all such lands and tenements shall entirely and continually remain in the king's hands, until the said inquests and verdicts be returned, and by a month after the same return; unless the party grieved come into Chancery, [This was because, where an office was necessary to entitle the king, the commission must issue out of Chancery. 5 *Rep*. 52. *a*.] and proffer to traverse the inquest, and offer to take the same lands and tenements to farm; and if he do, then the lands shall be committed to him upon certain terms, till the traverse is decided: and if any letters patent of any lands and tenements be made to the contrary; or if they be let to farm within the said month; they shall be holden for none. The stat. 18 *H*. 6. *c*. 6. recites the above provisions, and states that, to evade it, divers persons had sued to obtain gifts grants and farms by patent, before any inquisition or title found for the king; pretending such gifts or grants were not comprised or remedied by the former act, though they are within the same mischief; and therefore provides that no letters patent shall be made to any person of any lands or tenements before inquisition of the king's title in the same be found in the Chancery, or in his Exchequer returned, if the king's title in the same be not found of record, nor within the month after the same return; if it be not to him or them which tender their traverses as before mentioned: and if any letters patent be made to the contrary, they shall be void and holden for none. The object of the

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

the legislature, therefore, plainly was, *according to the words of the acts*, that in all cases in which the king's title did not appear upon record; ("if the king's title in the same be not found of record") the possession should be open to whoever could claim against the king till the final decision of the right; and that any grant to obstruct him should be void: and the authorities correspond with this object. *Staundford*, in his *Prerogativa Regis*, 54. *a.*, though he states that the king has *a possession in law* upon a descent, reverter, remainder, or escheat; yet adds, that he cannot make it *a possession in deed* by his grant; *because there is a statute* 18 *H.* 6. *to the let thereof.* *Brooke*, *Office de Escheator*, *pl.* 56. says, If the king grant land to *A.* for life, and *A.* die, he cannot grant the land again till *A.*'s death be found by office; *and that by* 18 *H.* 6. In *Sav.* 70. it is said to have been granted by the whole Court, that under a lease for 20 years from the crown, with proviso, that if the rent should be in arrear 10 days, the lease should be void; if the rent were in arrear, though the freehold were in the crown before office, yet that the crown could not make a lease or grant thereof, without an office thereof found and returned; and that by 18 *H.* 6. *c.* 6. But the Court cannot lay much stress on this authority; for it also describes *Shute*, second Baron, as having been of opinion that *the freehold* was in the queen, and, *therefore* in her to demise *without office found:* and there are other parts of the report which shew it is not deserving of attention. It states as the question, whether *the freehold* were in the queen before office found: it describes *Shute*, second Baron, as being of a clear opinion, that the freehold was in the queen; and *Manwood*, as agreeing that *the freehold* was in the queen, but not to grant without office found: and that if the lease had been, that

upon

1810.

Doe, Lessee of Hayne and His Majesty, *against* Redfern.

upon non-payment she should re-enter, there must have been an office before she could have been entitled to the *freehold*; and yet, as the queen had only granted a lease for 20 years, how could there, in the correct sense of the word, be any question as to the *freehold*? Besides, if the rent in that case were made payable at the exchequer, then, according to *Finch* v. *Throgmorton*, 2 *Leon*. 134, 139. *Poph*. 25. 53., the queen might have granted without office; because, as said by *Popham* (*p*. 28.), "If it had been "paid, the payment would have been entered of record; "and not being so, the default appeareth of record." And if the rent were not made payable at the exchequer, then, according to *Stephens* v. *Potter*, *Cro. Car*. 100. the queen not only could not grant without office, but an office would have been necessary to terminate the lease. The Court, therefore, does not rely upon the case in *Sav*. 70. The cases, however, which seem to sanction grants from the crown, where there has been no office, are at least consistent with the notion, that an office was essential to make the grant valid in this case, which is that of an escheat where no tenure of the crown is found, if they do not furnish ground for it. In *Finch* v. *Risely*, or *Finch* v. *Frogmorton*, *Poph*. 25. 53., 2 *Leon*. 134. *Cro. Eliz*. 221., and 1 *Anderson*, 303., where a lease was granted by the crown for 70 years, with a proviso that it should be void if the rent should be in arrear; and a grant in fee, without office, after the rent was in arrear, was held good; the rent was made *payable at the exchequer*; (as appears from *Poph*. and 2 *Leon*. 139., and from the pleadings in *Co. Ent*. 191; though that fact is not noticed in *Cro. Eliz*. or *Anderson*:) so that the nonpayment within the time *appeared of record*, by reference to the records of the exchequer; and that, therefore, was a

1810.

Doe, Lessee of Hayne and His Majesty, against Redfern.

case in which the king's title was found of record. In *Dyer*, 145, 6., where a grant of the lands of a person attainted of high treason was thought by some of the judges to be good, without an office; the ground was that as the stat. 33 *H.* 8. *c.* 20. had in such cases vested the *actual possession* and seisin in the king, without office, it had taken them out of the operation of the stat. 18 *H.* 6. In *Knight's* case, *Moor*. 199. where three judges, against one, were of opinion, that the stat. 18 *H.* 6. applied to those cases only where the land came to the king *by new title*, not to those where his title in fee already appeared of record; though there was no decision upon the point, the opinion of the three evidently was, that in such case as this the land would be considered as coming to the king by new title; and that a previous office would consequently be necessary to make a grant valid: for they put, as instances of *new* title, "wardship, attainder, mortmain, or the like:" and title *by escheat* is as much a *new* title, or title arising from circumstances not already appearing of record, as title by wardship or attainder. And they state this, as the mischief at common law, that they who had rights could not traverse the office, and have the lands to farm, but were prevented by grants before office returned; whereby the king had disabled himself from granting the land to farm to him who tendered the traverse: and the present cause is certainly within this mischief. Upon these grounds, therefore, that this case is within the words and spirit of the statutes of *Hen.* 6., and within the mischief intended to be redressed; and that the cases in which grants, without office, have been thought maintainable, are plainly distinguishable from this; we are of opinion that the grant to *Hayne* in this case is bad, unless the inquisition shall be deemed sufficient to support it.

The

1810.

DOE, Lessee of HAYNE and His MAJESTY, against REDFERN.

The objection to the inquisition is, that it does not state of whom the lands were holden; and by stat. 2 and 3 *Edw. 6. c.* 8. *s.* 8. it is expressly provided, that where any inquisition or office shall be found by these words or the like, "quod de quo vel de quibus tenementa tenentur ignorant," such tenure so uncertainly found shall not be taken for any immediate tenure of the king; but a melius inquirendum shall be awarded, as has been accustomed in old time. An inquisition not finding of whom the lands are holden is in substance the same as one finding the ignorance expressly: (See *House*'s case, *Cro. Jac.* 40.) for in favor of the omission to find as directed, it must be presumed that the jurors did not know, rather than that they knew and would not return the fact: but in either case the award of a melius inquirendum would be necessary. There is no ground for confining the statute to particular inquisitions only: *Co. Litt.* 77. *b.* considers it as applying generally to all inquisitions. The statute, therefore, is decisive upon this point. The case then is reduced to the demise by the king: and if the king could not grant or let to farm, without office, we do not see how the count upon his demise can be supported. The Court cannot treat the demise as *nominal* only, to bring the king's title into discussion; but must consider it as an actual demise; and an actual demise is in the teeth of the stat. 18 *H.* 6. We are, therefore, of opinion, that the plaintiff is not entitled to recover, and that the postea must be delivered to the defendant.

1810.

Monday, Feb. 5th.

Serving notice of declaration filed, together with the writ, at the same time, is irregular.

STEWARD *against* LUND.

THE writ was sued out (*a*) on the 22d, returnable on the 23d of *January*, and was served, together with notice of the declaration filed, on the return day. Whereupon *Gaselee* obtained a rule nisi on a former day for setting aside the declaration, with all subsequent proceedings, for irregularity; as having been filed before the service of the writ, which was a manifest inconsistency: and cited *Brook* v. *Bennet*, *Tidd's Pract.* 397. 4th edit. which cites 3 *Smith*, 531. where it was held that the writ could not be served and notice of declaration given at the same time; as such notice presupposed the declaration to have been filed before, and it could not regularly be filed till after the writ was served. *Lawes* opposed the rule, on the ground that the practice was calculated to save trouble and expence, and was no prejudice to the defendant. But *The Court*, after consulting the Master, said that the practice, having been once settled, they would not alter it; and made the rule absolute.

(*a*) Vide 4 *Term Rep.* 610.

1810.

The KING *against* The Justices of the West Riding of YORKSHIRE.

Monday, Feb. 5th.

AN application was made in the last term to this Court for a mandamus to the defendants, directing them at the then next Quarter Sessions to make an order for *A. Horsfall*, one of the petty constables of the constablery of *Hartishead with Clifton* in the W. R., to raise and levy 52*l.* 5*s.* 11*d.* by an *equal rate* upon the owners and occupiers of messuages, lands, &c. within the said constablery liable to be rated to the relief of the poor, for the purpose of re-imbursing him the money which he had paid for the proportion of the said constablery towards the county rate. Upon shewing cause against the rule, it was agreed that the matters in dispute should be tried in feigned issues at the then next Summer assizes at *York*, wherein *A. Horsfall* should be plaintiff, and *J. Goldthorpe* defendant; and that the questions tried in those issues should be, 1st, Whether the two townships, vills, or places of *Hartishead* and *Clifton* in the W. R. did or did not, before and since the stat. 12 *Geo.* 2. *c.* 29., for the more easy assessing, collecting, and levying of county rates, form *one* constablery or place known by the name of *Hartishead with Clifton*, for the purpose of raising such rates. 2d, Whether *Hartishead* and *Clifton* were or were not, before and since that statute, two separate townships, vills or places, for the purpose of raising such rates.

Where before the stat 12 *G.* 2. *c.* 29. the county rates had been assessed upon the entire district or place of *Hartishead with Clifton*; but the two townships of *H.* and *C.* separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet as that statute only establishes the accustomed proportions of contribution to the county rates as between the entire districts which were before assessed to such rates within the limits of the respective counties, &c. and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts; this case was held to fall within the 3d section, which provides that where there is no poor's rate in the *parish, township, or place* assessed to the county rates (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates) the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied; that is, by an *equal* rate on all the inhabitants, &c.

 And

1810.

The KING *against* The Justices of the W. R. of YORKSHIRE.

And by the rule of Court it was agreed to be admitted, that the townſhips of *Hartiſhead* and *Clifton*, before the ſtatute, uſually contributed between themſelves to the county rates or ſome of them in the proportion of 1-3d by *Hartiſhead* and 2-3ds by *Clifton* of the whole ſum paid by the two townſhips of *Hartiſhead* and *Clifton*: and by the rule of Court it was left to the Judge, before whom the iſſues ſhould be tried, to cauſe any ſpecial matter to be indorſed on the poſtea which he thought fit. The jury found for the plaintiff on both the iſſues; thereby eſtabliſhing the unity of the two townſhips in one joint conſtablery, which had been always aſſeſſed together for the county rates as one entire diſtrict. Upon this finding the application for the mandamus was renewed; which

Topping, *Ainſlie*, and *Littledale*, now oppoſed, and obſerved that the ground of the application was not that the juſtices in Seſſions had refuſed to make any rate for the reimburſement of the conſtable, but that they had refuſed to make an *equal* rate upon the owners and occupiers of lands within the two townſhips, now found indeed to conſtitute one conſtablery for the purpoſe of raiſing county rates, but ſo found, upon evidence, all of which went to eſtabliſh that ſuch joint rate, with reſpect to the Riding at large, had always been raiſed as between the two townſhips in certain proportions; namely, 1-3d by *Hartiſhead*, and 2-3ds by *Clifton*. And it appears that there is no joint poor rate out of which the county rate can be paid; for each townſhip has always had ſeparate overſeers; and the poor's rate has always been raiſed in the proportions before mentioned, at leaſt from 1739 to 1810, as appeared in evidence. The queſtion then is, whether there be any thing imperative in the ſtat. 12 *G.* 2. *c.* 29. to compel the Court to direct a deviation from the

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accustomed mode of raising the rate as between these townships. That statute, which was made for the better collecting of county rates than was before done under several antecedent acts, directs the justices in Sessions to make one general rate for all the purposes of the recited acts, instead of the separate rates before made for each distinct purpose; which general rate however is directed to be assessed "upon every town, parish, or place, &c. "*in such proportions* as any of the rates heretofore made "in pursuance of the said several acts *have been usually* "*assessed.*" And then it enacts, "that the several sums "so assessed *upon each and every* town, parish, or place, "&c. shall be collected by the high constables of the re-"spective hundreds and divisions in which any town, &c. "doth lie, in such manner, and at such times as is here-"inafter directed." By s. 2. the churchwardens and overseers of the poor of each parish and place are required out of the money collected for the poor's rate to pay to the high constable of the hundred or division in which it lies the sum assessed upon such parish or place, within 30 days after demand in writing; and the receipt of the high constable shall be a discharge to the parish officers for so much in their accounts. And then sect. 3. provides (which seems to include the case in question,) "that in case *no rate*" (by which must be understood no poor's rate co-extensive with the district charged) "shall "be made for the relief of the poor in any parish, town-"ship, or place, the justices in Sessions shall by their or-"der direct the sum assessed on such parish, township or "place, for the purpose of this act, to be rated and levied "on any such parish, &c. by any petty constable, &c. *in* "*such manner* as money for the relief of the poor is by law "to be rated or levied:" and the sum so assessed is to be

 paid

1810.

The King *against* The Justices of the W. R. of Yorkshire.

paid over to the high conſtable, and is leviable on the petty conſtable in the ſame manner as the rates under the 2d clauſe are leviable upon the pariſh officers. Now here it appears that there is no equal joint poor's rate for *Hartiſhead* and *Clifton*; but that the rate has always been raiſed in certain diſtinct proportions. [*Le Blanc* J. It comes to this queſtion, whether this diviſion of the county rate between *Hartiſhead* and *Clifton* was a proportion agreed to be obſerved between themſelves; or whether the rate were by law neceſſarily to be raiſed in thoſe diſtinct proportions. I rather conſider that the proportions ſpoken of by the act meant the proportion which one entire diſtrict bears to other entire diſtricts within the juriſdiction of the juſtices, and do not relate to the ſubdiviſions of each particular diſtrict.] In *The King* v. *The Inhabitants of St. Paul, Covent Garden* (a) this Court held that the Seſſions had no power to vary the proportions in which the county rate had *uſually* been aſſeſſed on the ſeveral *pariſhes*: and by a parity of reaſon, the ſame conſtruction ought to apply to ſuch ſubdiviſions as have been accuſtomed to raiſe their poor rates in certain diſtinct proportions. The legiſlature never meant to meddle with the proportions in which the poor rates were accuſtomed to be raiſed in any "pariſh, townſhip, or *place*," but to adopt thoſe proportions in raiſing the general county rates; and the word *place* ſeems to have been uſed in order to meet ſuch a caſe as this. The county rate then, having as far back as can be traced been paid out of the poor rates in the proportions ſtated to exiſt as between the two townſhips, ſhould ſo continue to be raiſed, as the act directs the rate to be aſſeſſed in the ſeveral places in ſuch proportions as had been uſually aſſeſſed. [*Le Blanc* J. noticed

(a) *Cald.* 158.

the

1810.

The KING
against
The Justices of the W. R. of YORKSHIRE.

the 4th clause of the act, enabling the justices in certain counties, including the county of *York*, to order, if they think fit, the money assessed on every such town, parish, or place, for all or any of the purposes of the act, to be paid by and levied on the petty constable of the town, parish, or place, in the manner directed to be pursued where there is no poor's rate: probably contemplating that in those counties the poor's rate was principally collected separately by different townships in the same parish, when the county rates were assessed and raised on the parishes at large.]

Park, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. The act of the 12 *Geo.* 2. provides in the 1st section that one general rate shall be levied upon the towns, parishes, and places, in the aggregate, within the limits of the different commissions of the peace, instead of so many separate rates as were before leviable on each under different acts of parliament for the like purposes; which general rate however is to be assessed upon every town, parish, or place in such proportions as had been usually assessed; that is, the proportions of the general rate, as between the several towns, parishes, and places which had before been separately assessed, were to be preserved, but the money was to be raised upon each by one aggregate rate, instead of by the several distinct rates before leviable under different acts of parliament for distinct purposes. Then were these townships of *Hartishead* and *Clifton* rated, and did they pay before the act of *Geo.* 2. as one town, parish, or place, or as separate townships, &c.? The fact appears to be, that though acting as two townships for some purposes, yet for the purpose of county rates, and quoad the act of

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1810.
The King against The Justices of the W. R. of Yorkshire.

the 12 *Geo.* 2. they constituted but one place. The 2d section provides that the payment of the county rate shall be made out of the money collected for the poor's rate in each parish and place: but that must be understood of parishes and places in which one general poor's rate is collected, and cannot therefore apply to a case like the present, where there is no such general fund raised upon the entire district which is assessed to the county rate. The case therefore must come within the provision of the 3d section, that where there is no poor's rate, that is, no poor's rate co-extensive with the district assessed, the county rate shall be levied by the petty constable "in "such manner as the money for the relief of the poor is "by law to be rated or levied;" that is, by *equal* taxation of the inhabitants, &c. of the place rated. The rate therefore must be levied equally on the whole of this artificial place or district, being that on which the county rates had before the act been usually assessed, as if it had been one parish; such being, as it appears to me, the true meaning of the act.

Grose J. declared himself of the same opinion.

Le Blanc J. The several rates which now compose the aggregate county rates were not used to be collected in the same subdivisions as the poor's rate; and the object of the legislature in the act of the 12 *Geo.* 2. for facilitating the collection of the county rates, was to provide that in all those cases where the county rates had been collected in the same district for which a poor's rate was collected, the county rate should be paid out of the poor's rate: but if there were no poor's rate collected in the entire district co-extensive with the assessment for the county rate, then the latter was directed to be raised by the

1810.

The KING *against* The Justices of the W. R. of YORKSHIRE.

the petty constable in the same manner as the poor's rate is by law to be levied; which must be by an equal rate. The proportions to be preserved, spoken of in the first clause of the act, are the proportions between the several entire districts on which the county rates were assessed before the act, and not the several subdivisions of those districts, which were made for other purposes.

Bayley J. Before the act of the 12 *Geo.* 2. several distinct sums were directed to be raised by county rates under different acts of parliament from the time of *Hen.* 8th to that of Queen *Anne*; and these were raised by so many distinct assessments, which were difficult to be collected from the smallness of the fractions into which the sums to be paid by the individuals of the different districts were to be divided: the act of the 12 *Geo.* 2. was passed to remedy that inconvenience by directing all these several sums, leviable under the different statutes, to be collected in one general rate, but preserving the same proportions of the integral rate to be paid as between the several districts on which the separate rates had before been assessed. The fallacy of the argument consists in applying the word *proportions* used in the act to the subdivisions of those districts on which the county rates had been used to be assessed, and which were not in the contemplation of the legislature, who only meant to preserve the same proportions as between the several districts before assessed to the county rates with reference to the counties at large; but did not mean to split the collection into the shares of the subdivisions of those districts between themselves. Now for the purpose of this act there is no poor's rate in the district of *Hartishead* with

Clifton,

1810.

The KING *against* The Justices of the W. R. of YORKSHIRE.

Clifton, becauſe there is no entire poor's rate collected throughout that diſtrict; and therefore the county rate muſt by the 3d ſection be raiſed as the poor's rate is by law liable to be raiſed, that is by an equal rate.

Rule abſolute for the mandamus.

Tueſday, Feb. 6th.

PULLER and Another *againſt* GLOVER.

The plaintiff, having ſhipped goods on an adventure to *St. Peterſburg*, on board a veſſel chartered for the purpoſe, made inſurance on ſhip and goods in the common printed form, in blank; and by a written memorandum in the policy "the underwriters agreed "to pay a total "loſs in caſe "the ſhip *Ann* "ſhould not be "allowed by "the *Ruſſian* "government "to diſcharge "her cargo at "*St. P.*, on "which voyage "the veſſel had "then failed "chartered "by the plaintiffs." Held that the inſured were entitled to recover upon this policy on an allegation that the veſſel on her arrival at *St. P* was not allowed by the *Ruſſian* government to diſcharge her cargo, but was obliged to return back with it, *by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of inſurance*, &c.

THIS was an action on a policy of inſurance, made at *London* and dated 25th of *May* 1808, on ſhip and goods, in the common printed form; leaving blanks for the name of the ſhip and the deſcription of the voyage; the ſhip and goods being valued at 2500*l.*; and the policy containing a memorandum, that, in conſideration of 10 guineas per cent. thereby received, the underwriters agreed to pay a total loſs *in caſe the ſhip* Ann, *Captain* S. Flower, *ſhould not be allowed by the* Ruſſian *government to diſcharge the cargo then on board at* St. Peterſburg, *on which voyage the veſſel had then ſailed, chartered by Meſſrs.* C. *and* N. Puller (the plaintiffs). The declaration then alleged, that the plaintiffs had a licence from the *Britiſh* government for the voyage mentioned in the memorandum; and that at the time of effecting the policy, and from thence, until, and at the time of the loſs after mentioned, the plaintiffs were intereſted in a large cargo of goods on board the ſaid ſhip on their own account, and which cargo was to be carried in the ſhip upon the ſaid voyage, and to be unloaded and ſold on their account at *St. Peterſburg*, and in certain premiums of inſurance neceſſarily expended

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by them upon the ſaid cargo to inſure the ſame upon the ſaid voyage, and which premiums amounted to all the money by the ſaid policy expreſſed and therein valued thereon; and that the ſaid inſurance was made for their own uſe and benefit. That the ſaid ſhip, with the ſaid cargo on board, ſailed from *London* upon the ſaid voyage, and *arrived at* St. Peterſburg, *but was not allowed by the* Ruſſian *government to diſcharge the cargo then on board at* St. Peterſburg, *on the ſaid voyage on which ſhe was then chartered by the plaintiffs, but was wholly prevented by the* Ruſſian *government from diſcharging her ſaid cargo, and was obliged to leave* St. Peterſburg *without diſcharging the ſame, and to return back with the ſaid cargo from* St. Peterſburg: by means of which premiſes the value of the ſaid cargo has been greatly diminiſhed to the plaintiffs, *and has been reduced below the amount of the invoice price of the ſaid cargo, together with the charges paid thereon, and the ſaid premiums of inſurance ſo expended by them upon the inſurance of the ſaid cargo as aforeſaid;* and the plaintiffs have been damnified in conſequence of not being allowed by the *Ruſſian* government to diſcharge the ſaid cargo at *St. Peterſburg*, and have loſt the premiums of inſurance as aforeſaid ſo inſured by them; by means of which and of the promiſe of the defendant he became liable to pay to the plaintiffs 200*l.* the amount of his inſurance, &c. To this the defendant demurred ſpecially; becauſe it did not appear with ſufficient certainty what loſs the plaintiffs had ſuſtained, nor how or in what reſpect they had been damnified; and becauſe it was not averred with ſufficient certainty that the ſhip had a licence from the king in council, or otherwiſe, &c.

Taddy,

1810.

PULLER *against* GLOVER.

Taddy, in support of the demurrer, contended, first, that this policy was void as a gaming or wagering policy within the stat. 19 *Geo.* 2. *c.* 37.; 2dly, that it was void at common law, as being made upon the *voyage* only, and not upon the ship or goods; 3dly, that at any rate the declaration contained no sufficient statement of loss. 1st. A gaming policy is not only where the assured had no interest in the subject matter, but where the event insured does not affect the safety of the thing insured: as here, the fact insured against, of the ship's not being permitted to load at *St. Petersburg*, is not connected with the safety of the ship or cargo: whereas a policy of insurance is a mere contract of indemnity against the loss or deterioration of the property insured. On that principle the Court in *Kent* v. *Bird* (*a*) held, that an agreement by the plaintiff to pay a premium to the defendant of 20*l*. at the next port an *East Indiaman* should reach; provided that if she did not save her passage to *China* the defendant would pay the plaintiff 1000*l*. in a month after she arrived in the *Thames*, without reference to any property; was void by the statute; although the plaintiff had goods on board liable to suffer by the loss of the season. [*Bayley* J. The plaintiff there did not shew any damage suffered in consequence of the non-arrival at *China* in time.] In *Kulen Kemp* v. *Vigne* (*b*), a *Danish* ship and cargo, bound from *Riga* to *Marseilles*, was captured by an *English* privateer and brought into *Falmouth*, where ship and cargo were condemned, but afterwards the sentence was reversed, and the expences of the reversal were ordered by the Court of Admiralty to be a charge upon the cargo. The plaintiffs, who were only interested in

(*a*) *Cowp.* 583. (*b*) 1 *Term Rep.* 304.

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the cargo, having paid the expences of reclaiming ſhip and cargo, inſured the amount by a policy on the goods at and from *Falmouth* to *Marſeilles*; with a memorandum, that the loſs was to be paid *in caſe the ſhip did not arrive at* Marſeilles. The ſhip was again captured by a *Spaniard*, and never in fact arrived at *Marſeilles*, and the cargo was loſt to the plaintiffs by the expences attending the ſecond capture and reclamation: yet as the goods were preſerved in ſpecie and ſold for the benefit of the owners, it was held that they could not recover the ſum expended in reclaiming thoſe very goods, upon an allegation of a loſs *by capture*; becauſe the event inſured, being the arrival of the *ſhip* at *Marſeilles*, that event might ſtill have happened notwithſtanding the capture, inaſmuch as the ſhip was reſtored; and therefore the event inſured did not affect the ſafety of the thing inſured. [Lord *Ellenborough* C. J. The events inſured in thoſe caſes were not connected with the ſubject matter of the loſſes: but how do they apply to this caſe where loſs has in fact happened from the very event inſured againſt, the non-allowance by the *Ruſſian* government of permiſſion to diſcharge the outward cargo at *St. Peterſburg*? It is the cauſa cauſans. It cannot be ſtated, that if a man be at the expence of ſhipping goods to a foreign port, and when the ſhip arrives there, he is not permitted to land them, but is obliged to bring them back, he does not ſuſtain a loſs. He certainly loſes the expences of carrying them there, including the premiums of inſurance.] 2dly, The inſurance is on the mere *voyage*, and not on the ſhip or goods. [Lord *Ellenborough* C. J. The inſurance was on the adventure of the goods ſhipped on the voyage deſcribed in the charterparty to which reference is made.] Then, 3dly, there is no averment that the goods were loſt, but only

1810.

PULLER *against* GLOVER.

only that they were reduced in value below the invoice price, with the charges paid thereon and the premiums of insurance. This is an attempt to involve the underwriter in the risk of the market, which he does not insure: the goods have not been deteriorated by any of the marine perils insured against. [*Bayley* J. Have not the premiums of insurance been thrown away upon an adventure which has become useless by means of the event insured against?] The premiums of insurance have not been lost, for the policy took effect so as to cover the safety of the goods against all marine perils during the voyage, and the assured had the benefit of it: but *the voyage*, so far from being lost, has been performed in safety. [*Bayley* J. The voyage has become inoperative by the event insured against. *Grose* J. The premiums of insurance may be added to the invoice price of the goods. *Le Blanc* J. If the invoice price of the goods were 100*l.* and the premiums of insurance 20*l.*, and the goods be returned again on the hands of the assured after the voyage out and home, it is clear that he must sustain a loss of 20*l.* on them at all events.] The premiums cannot be taken to be insured as part of the price of the goods, unless specifically stated as an object of insurance in the policy. The insurance is not to give the party a benefit in case of loss, but strictly to indemnify him against a loss of the identical subject matter of the insurance. [Lord *Ellenborough* C. J. Nothing is more common than to add the cost of the insurance to the value of the goods: and therefore any thing which causes a loss upon that value by any peril insured against is a loss within the policy.]

Puller contrà was stopped by the Court.

1810.

PULLER *against* GLOVER.

Lord ELLENBOROUGH C. J. It is firſt objected that this is a wagering policy within the ſtatute: but it is any thing elſe than a wagering policy. The plaintiff ſends out goods upon an adventure to *St. Peterſburg*, and he inſures againſt the event of their not being ſuffered to be landed on their arrival by the *Ruſſian* government. When the ſhip arrives there, the goods are prohibited to be landed, and the plaintiff loſes the benefit of his adventure, and is obliged to bring back his goods charged with all the expences of the voyage. Can we ſay then that this is a wagering policy, and that he had no intereſt in the ſubject of the inſurance? The goods are his; the adventure is legal; and he meant by this policy to guard againſt the event from which the loſs has in fact happened. There is, therefore, no pretence to ſay that it is a wagering policy within the ſtatute. It is next objected, that it is an inſurance upon the mere *voyage*, and not upon the property embarked on it: but the *voyage* mentioned evidently refers to the adventure ſtated. It is an inſurance on the goods for the voyage on which the ſhip was chartered, and with reference to the event deſcribed in the memorandum. Then, 3dly, it is objected, that there is no averment that the goods, as the ſubject matter of the inſurance, were loſt. But the loſs is averred from the ſhip not having been allowed to diſcharge the goods at *St. P.* Some loſs muſt have been incurred by that: the parties, indeed, agree by the memorandum to conſider that event as a total loſs: and though that would not make it a total loſs, if it were in its nature leſs than total; yet it would be open to the party at the trial before a jury to ſhew how much loſs, if any, had been incurred by the event. There is no ground, therefore, for the demurrer, upon any of the objections ſtated.

1810.

FULLER *against* GLOVER.

GROSE J. concurred.

LE BLANC J. This was clearly an infurable rifk, and within the policy: for it appears that the affured were interefted in the goods, and that they chartered a veffel to carry them out to *St. Peterfburg;* and they have clearly fuftained a lofs by the happening of the event infured againft; for they have had the goods returned upon their hands with all the charges of the voyage out and home added to the original invoice price.

BAYLEY J. This is no wagering policy, and the plaintiffs feek to recover nothing but an indemnity for the lofs actually fuftained by them upon the goods. They fent the goods out upon an adventure to *St. Peterfburg*, and they infured againft the event of their not being fuffered to be landed by the *Ruffian* government; confidering that in that event though they got the goods back again, they fhould get them charged with all the expences out and home: and they might well fay that, contemplating the probability of the event which happened, they would not engage in the adventure, unlefs the underwriters would indemnify them in cafe the goods were not fuffered to be landed. The underwriters agreed to this, and the contract was legal; and as the goods were not fuffered to be landed, and the plaintiffs have incurred the lofs charged by them, they are entitled to recover the amount of it from the underwriters.

Judgment for the plaintiffs.

1810.

LAROCHE and Others *against* OSWIN.

Tuesday, Feb. 6th.

An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadsted at anchor under orders of the convoy, and after a signal to prepare for sailing, and about the time when the signal for weighing was made, taking in other goods on board; by which it was found that no delay was occasioned, and that the ship got under way as soon as she could otherwise have done.

THIS was an action upon a policy of insurance on goods on board the ship *Juno* from *Gottenburgh* to a port or ports in the *Baltic*, with liberty in case of non-admittance to unload at *Carleshaunn*, warranted free of capture in ports. The interest was averred to be in *James Ausset*; and the declaration alleged in one count a loss by capture, not in any port or ports; and, in another, a loss by barratry: and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs for 200*l.*, subject to the opinion of the Court on the following case.

The goods in question were shipped by Mr. *Ausset*, on whose account the insurance was made; and formed part of a large cargo shipped by various persons at *Gottenburgh*. The ship sailed from thence bound to *Memel* or *Lisbon* on the 22d *May* 1809, under convoy of the *Thunder* bomb vessel. On the 26th the fleet anchored in *Malmoe* roads, and on the 3d of *June* got under weigh again; but, in obedience to a signal from the commodore, returned to *Malmoe* roads, and remained at anchor there until the 9th: on which day, about half past 12, the commodore made a signal to prepare for sailing, and about an hour afterwards the signal to weigh: but before the signal for weighing was made, a boat came along-side the *Juno* with 11 small boxes and two parcels of indigo, which were taken on board about the time when the last mentioned signal was made: about 3 o'clock she got under weigh with, and was amongst the foremost of, the fleet, which consisted of 76 vessels, when she unfortunately ran

 aground,

1810.

LAROCHE *against* OSWIN.

aground, and was, with ſome other veſſels of the fleet, captured and burnt by *Daniſh* gun-boats at ſome diſtance from the road, and not in any port. The indigo was not part of the original intended cargo, but had been ordered by ſome merchant on board the ſhip, with whom Mr. *Auſſet* had no concern, after the arrival of the ſhip at *Malmoe*, and was brought off from the ſhore as ſoon as it arrived from up the country. Mr. *Auſſet* was not intereſted in it. The time conſumed in taking it in was not more than from 10 to 20 minutes; and bulk was not broken for the purpoſe of ſtowing it away; but it was ſtowed on the cable ſtage. No delay was occaſioned by the taking it in, and the ſhip got under way as ſoon as ſhe could otherwiſe have done. If the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to ſtand: if not, a nonſuit was to be entered.

This caſe was deſired to be reſerved for the purpoſe of taking the opinion of the Court again upon the point decided in *Raine* v. *Bell* (*a*), where it was held not to be an implied condition in a common marine policy on *ſhip* and *freight* that the ſhip ſhould not trade in the courſe of her voyage, if it might be done without deviation or delay, or otherwiſe increaſing the riſk of the inſurers. In that caſe the ſhip inſured having put into *Gibraltar* in the courſe of her voyage from her loading port or ports in *Spain* to *London*, in order to get a ſupply of proviſions; Lord *Ellenborough* C. J. left it to the jury to ſay whether her going into *Gibraltar* were of neceſſity for the purpoſe ſtated; and if ſo, whether her ſtay there were longer than was neceſſary for that purpoſe: telling them that if there were no neceſſity for going there, or for ſtaying there ſo long for the purpoſe of being ſupplied with proviſions, the

(*a*) 9 *Eaſt*, 195.

policy

1810.

LAROCHE *against* OSWIN.

policy would be avoided; but not otherwise. And this Court afterwards confirmed the propriety of that direction. The only difference in fact now pointed out by *Scarlett* for the defendant, between that case and the present, was that this was a policy on *goods*, and that on ship and freight: but it was not pretended that this made any difference in principle. And he also observed that the judgment in that case might have been sustained by considering *Gibraltar* as a port *in* Spain. But *Bayley* J. observed that it was not a port on the coast of *Spain*, within the meaning of the contracting parties; and the Court did not decide the case upon that ground, but upon the general principle stated. And Lord *Ellenborough* C. J. now asked, how the risk could be shewn to have been enhanced or varied in any manner by the circumstance of taking in the goods, when it is found as a fact that no delay was occasioned by it, and that the ship got under way as soon as she could otherwise have done. To this *Scarlett* answered, that though the risk were not enhanced, yet it was varied; for the voyage from *Gottenburgh*, the ship's loading port, had commenced; and afterwards while the ship was taking in other goods, it constituted a different adventure, and so made the risk different.

Lord ELLENBOROUGH C. J. The risk insured was neither enhanced or varied, but something was done in the course of the voyage which made no difference in either, and therefore was no discharge of the underwriters' liability. The cases of *Stitt* v. *Wardell* and *Sheriff* v. *Potts*, in which a different opinion had prevailed, were duly considered and over-ruled by the Court in *Raine* v. *Bell*, which governs the present.

1810.
LAROCHE *against* OSWIN.

The other Judges concurred, and *Le Blanc* J. added, that the rule laid down in *Raine* v. *Bell* had been since acted upon in another case of *Cormack* v. *Gladstone* (*a*).

Postea to the Plaintiffs.

Gaselee was to have argued for the plaintiffs.

(*a*) 11 *East*, 347.

Tuesday, Feb. 6th.

COUPLAND and Another, Assignees of LEEDHAM, a Bankrupt, *against* MAYNARD and Another.

One being in possession of premises as tenant from year to year under an agreement for a lease of 14 years, and the rent being in arrear, enters into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that *he had agreed to quit and to deliver up the premises to them*, and that a valuation should be made of his effects on the premises by two indifferent persons, to be chosen, &c. and that the same should in the mean time be assigned and delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, on trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant: held that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects; such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year, and, consequently, that the right of the landlords to distrain for the arrears of rent continued after six months from the making of the indenture.

THE plaintiffs declared in assumpsit, that on the 7th of *Aug.* 1806 it was agreed between them, as assignees of *J. Leedham* a bankrupt, and the defendants, on behalf of themselves and other proprietors of certain inns at *Matlock* in *Derbyshire*, that the plaintiffs should deliver to the defendants and the said other proprietors the actual possession of the said premises, late in the occupation of the bankrupt, on the 1st of *Nov.* 1806, and should pay half a year's rent for the same, becoming due on the 10th of *October* 1806, and all taxes up to the 5th of *April* 1807; which possession and payment the defendants thereby agreed to accept in satisfaction for all rent due since the 5th of *April* 1806; and agreed that they would, without

prejudice

1810.

COUPLAND *against* MAYNARD.

prejudice to the right, if any, claimed by the proprietors of the ſaid inns, of diſtraining upon the ſaid premiſes for all arrears of rent due at *Lady-day* 1806 from the bankrupt, accept at a valuation all the houſhold goods, &c. on the premiſes; and would, upon ſuch valuation being made, and upon receiving the poſſeſſion of the ſaid goods and other property, give to the plaintiffs their promiſſory note for the amount of ſuch valuation payable on the 1ſt of *May* 1807. The count then ſtated that the valuation of the goods amounted to 2966*l.* 16*s.* 7*d.*; and that the defendants thereupon accepted the ſaid goods and other property at that ſum, and received the poſſeſſion thereof from the plaintiffs, but had not given their promiſſory note according to their agreement. The declaration alſo contained the common counts for goods ſold and delivered, money had and received, and upon an account ſtated: to which the general iſſue was pleaded; and at the trial before Lord *Ellenborough* C. J. in *Middleſex*, a verdict was taken for the plaintiffs for 1874*l.* 16*s.* 11*d.*, ſubject to the opinion of the Court on this caſe.

On the 7th of *Nov.* 1798 a written agreement was made between the defendants and others, as proprietors of the premiſes mentioned in the declaration, for a leaſe of thoſe premiſes to *J. Leedham* for 14 years, at certain rents, and at a further rent of 7*l.* per cent. upon all money which the proprietors ſhould expend in the improvement of the premiſes. *Leedham* held the premiſes under this agreement, but no leaſe was ever granted. In 1804, ſeveral ſums having been expended by the proprietors in improvement of the premiſes, the rent was fixed at 500*l.* per annum for a certain part called the *Old Bath*, and 50*l.* per annum for the other part called the *Temple*. On the 12th of *Feb.* 1805, the rent being conſiderably in arrear,

1810.

Coupland *against* Maynard.

an indenture of this date was executed between *Leedham*, *Maynard* the defendant, and one *J. Wilkinson*, on behalf of *Maynard* and the other proprietors; whereby, after reciting the agreement of the 7th of *Nov.* 1798, and that certain arrears of rent were then due, and further rent would be due from *Leedham* on the 5th of *April* then next; and further reciting that *Leedham* had agreed to quit and deliver up the premifes to *Wilkinfon* in truft for the proprietors and for the defendant *Maynard*, on the 5th of *April* then next; and that it had been agreed that a valuation fhould be made of the houfehold goods, furniture, ftock and effects, by two indifferent perfons to be chofen, &c., and that the fame fhould in the mean time be affigned and delivered up to *Wilkinfon* upon the trufts thereafter mentioned; it was witneffed that *for the confiderations therein mentioned* Leedham *did affign* all his houfehold goods, &c. perfonal eftate and effects upon the premifes, to *Wilkinfon*, upon truft to have fuch valuation made as aforefaid; and out of the amount to retain the fums due for rent and arrears up to the 5th of *April* then next, and to pay the refidue to *Leedham* on the faid 5th of *April*. *No poffeffion was ever taken under this indenture by or on behalf of the proprietors; neither was there any valuation made of the* furniture and effects; but *Leedham* continued to occupy as before as well the premifes as the furniture and effects, until the 10th of *Feb.* 1806; when no payment having been made on account of the rent, and more rent having become due, a fecond indenture was made between the fame parties as the firft; whereby, after reciting in fubftance as before, and that *Leedham* had agreed to quit and deliver up poffeffion of the premifes to *Wilkinfon* on the 5th of *April* 1806, *Leedham affigned* all his houfehold goods, &c. perfonal eftate and effects upon

upon the premises, to *Wilkinson*, upon trust to have such valuation made as aforesaid, and out of the amount to retain what was due for rent and arrears, as mentioned in the second indenture, up to *April* 1806, and to pay the residue to *Leedham* on or before that day. Upon the execution of this last indenture possession was taken by *Wilkinson* of the goods, furniture, and effects thereby assigned; but this possession was afterwards abandoned when it had continued a month, and *Leedham* was again left in full possession of the premises. No payment of the rent then in arrear was made by *Leedham*, but every thing remained as before until the 1st of *March* 1806, when a third indenture was made between the same parties, similar in all respects, except that it recited an agreement on the part of *Leedham* to quit on the 5th of *April* 1807: by which last indenture *Leedham* assigned all his household goods, stock, &c. personal estate and effects upon the premises to *Wilkinson*, on trust to have such valuation made as aforesaid, and out of the amount to retain and pay the several sums in that indenture mentioned, and also the growing rents from *Leedham* during such his holding as aforesaid, and to pay the residue to *Leedham* on or before the 5th of *April* 1807. On the 3d of *June* 1806 a commission of bankrupt issued against *Leedham*, under which his effects were duly assigned to the plaintiffs; the act of bankruptcy on which he was declared bankrupt being the said deed of assignment of the 12th of *Feb.* 1805. On the 7th of *Aug.* 1806 the agreement stated in the first count of the declaration was entered into between the plaintiffs and defendants; and the goods and effects therein mentioned upon the premises were afterwards valued at 2966*l.* 16*s.* 7*d.* at which sum the defendants accepted the same. The defendants never

1810.

Coupland *against* Maynard.

gave their promissory note for such sum or any part thereof, but paid into court under the common rule 1194*l.* 19*s.* 4*d.*, which was the balance due from the defendants to the plaintiffs, after deducting all rent and arrears of rent for the premises up to the 10th of *Oct.* 1806, part of which rent accrued before the 5th of *April* 1805, and part afterwards. The plaintiffs took the money out of court. It was admitted on the part of the plaintiffs that under the agreement of the 7th of *Aug.* 1806 the defendants were to be in the same situation as if they had actually distrained upon the premises at the time of making the agreement, or at any time since; it being understood at the time, that it was for the interest of all the parties, both plaintiffs and defendants, that no actual distress should be made upon the premises. The question for the opinion of the Court was, whether at the time of making the agreement in the declaration mentioned the defendants and the other proprietors of the premises were entitled to distrain for the arrears of the rent due on the 5th of *April* 1805. If the Court were of opinion that they had such right of distress, a verdict was to be entered for the defendants: if not, the verdict entered for the plaintiffs was to stand for 1874*l.* 16*s.* 11*d.*

Fell, for the plaintiffs, denied the right of the owners of the premises to distrain for the arrears of rent; and contended that the effect of the indenture of the 12th of *Feb.* 1805 was to put an end to the former tenancy from year to year, under the agreement of *Nov.* 1798, for a lease for 14 years, which was never executed; and to make a new tenancy; and therefore that the landlords lost their right to distrain for the arrears of rent due under the former tenancy, after the expiration of six months from

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1810.

COUPLAND *against* MAYNARD.

its determination. The principal queſtion is whether the preceding tenancy were determined by that indenture; and this depends on others; 1ſt, Whether the recital in the indenture of the agreement by *Leedham*, to quit and deliver up the premiſes, operated as a ſurrender in law of the term: and if ſo, 2dly, Whether the ſubſequent circumſtances amounted to a waver of that ſurrender, ſo as to ſet up the former term: and alſo, 3dly, Whether, as that indenture aſſigned all *Leedham*'s effects and amounted to an act of bankruptcy, it were not void in toto, ſo as to do away the whole agreement. 1ſt, The indenture recites an expreſs agreement by *Leedham* to quit and deliver up the premiſes to *Wilkinſon* on the 5th of *April* 1805, which operates as a ſurrender in law of the term from year to year under which the tenant held. Lord C. B. *Gilbert* (*a*) ſays, "that any form of words whereby ſuch an intent and agreement of the parties may appear (*i.e.* for the tenant to yield up the eſtate), will be ſufficient to work a ſurrender; and the law will direct the operation and conſtruction of the words accordingly, without the formal mention of the word ſurrender in the conveyance." "Therefore (he adds) if leſſee for years ſay to the leſſor, that his will is that the leſſor ſhall enter into his lands and ſhall have the ſame, or is content that the leſſor ſhall have again the land, and by virtue thereof the leſſor enters into the land; this is a ſufficient ſurrender." And with this agree *Perk. ſ.* 607. 608. *E.* 40. *Ed.* 3. 24., and *Sleigh* v. *Bateman* (*b*). He was proceeding to argue on the other points of the caſe; but the Court being againſt him upon this point, it became unneceſſary.

(*a*) 4 *Bac. Abr.* 209. Leaſes, S. (*b*) *Cro. Eliz.* 487.

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1810.

COUPLAND *against* MAYNARD.

Lord ELLENBOROUGH C. J. Is there any cafe where the tenant having agreed to furrender his term for a particular purpofe to be effected, and that purpofe is not effected, fuch conditional agreement has heen held to operate as an abfolute furrender; though the tenant has never in fact quitted the poffeffion? Here there were mutual acts to be done; the tenant's ftock and effects upon the premifes were to be valued, and he was to give up poffeffion; but no fuch valuation was made; nor did the tenant relinquifh the poffeffion of the premifes. How then can we take this to have been an actual furrender of the term merely from the agreement to furrender, when it appears that neither of the parties acted upon that agreement? Though the word *condition* be not ufed in the indentures, it is in effect an agreement to furrender on condition, and that condition was not executed. The confequence is, that the tenancy continued to fubfift, together with the right of the landlords to diftrain for the arrears of rent.

The other Judges concurred.

Poftea to the Defendants.

Balguy for the defendants.

1810.

WILLIAM, Lessee of HUGHES and HESTHER his Wife, *against* THOMAS.

Tuesday, Feb. 6th.

Tenant for life having levied a fine, and afterwards devised the premises, and died seised; the entry and continuing possession of the devisee (the defendant in ejectment) is no disseisin of the reversioner, *disseisin* importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And, therefore, no question could arise whether, considering the devisee of the reversion as a disseisee, a fine sur cognizance de droit come ceo, levied by her before entry to a stranger, without any declaration of uses, would bar her right of entry by estoppel and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be altogether inoperative.

After a devise to one and *her heirs* of certain lands in *A*, and other devises to the same person and her *executors*, administrators, and assigns of leasehold interests in *B*., *C*, and *D*., a devise of all the residue of the testator's estate and effects, real and personal, whatsoever and wheresoever, not before disposed of, after payment of debts, legacies, and funeral expences, to the same devisee, *her executors, administrators, and assigns, for her own use absolutely*, will carry a distant reversion in fee in the lands in *B*; the words of the residuary clause being large enough to carry the fee, as comprehending all the residue of the devisor's *real estate*, and giving it to the devisee *absolutely*; and the intent to devise the whole interest in all his remaining property not being rebutted by limiting the estate to her and *her executors, &c.* omitting *heirs*, or by the limitation of other lands to her and her *heirs*; or by the prior devise of a leasehold interest to the same person in the same lands of which the devisor had such distant reversion.

THIS was an ejectment for certain lands called *Place y Parke*, *Crygistiller*, *Fynom beder*, *Pantygwr*, and *Cwrndwrywyns*, in the parishes of *Treleach ar Bettws*, *Leanwinio*, and *Mydrim*, in the county of *Carmarthen*; and upon the trial before *Graham* B., at *Hereford*, a verdict was found for the plaintiff, subject to the opinion of this court on the following case.

Richard Davies, being seised in fee of the premises in question, by his will duly executed and attested, dated *Aug.* 16th, 1783, devised the same to certain trustees and their heirs, upon trust to the use of his wife *Grace Davies* for life; remainder to the use of his brother *Thomas Davies* for life; remainder to the trustees to preserve contingent uses, &c.; remainder to the first and other sons of the body of *T. D.* successively in tail male, in strict settlement; with like remainders to his brother *William* for life, and to his first and other sons in tail male, in strict settlement; remainder to his sister *Ann* (then *Ann Evans*, widow,) for life; remainder to the trustees to support

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1810.

WILLIAM, Leſſee of HUGHES, *againſt* THOMAS.

the contingent uſes, &c.; remainder to her firſt and other ſons, in ſtrict ſettlement, in like tail; with reverſion to the teſtator's own right heirs for ever. By the ſame will he alſo deviſed other lands, &c. and alſo all other his real eſtates, not before deviſed, unto his ſaid brother *Thomas Davies*, his heirs and aſſigns for ever. The teſtator died without iſſue in 1783, after making his will; leaving *Thomas Davies* him ſurviving, his brother and heir at law. On the death of the teſtator, his widow, *Grace*, entered upon and became ſeiſed of the premiſes in queſtion, under the deviſe to her for life; and died ſeiſed on the 27th of *March* 1788. *Thomas Davies*, the brother and heir of the teſtator, died *Oct.* 9th, 1787, without iſſue; having previouſly made his will on the 4th of *Sept.* 1787, duly executed and atteſted, whereby he deviſed as follows: "Firſt, I give and deviſe unto my wife *Heſther Davies* all that meſſuage and lands called *Llwyndiviis*, in the pariſh of *Egermont*, in the county of *Carmarthen*, and all that meſſuage and lands called *Blaenyrornant*, in the ſeveral pariſhes of *Mydrim* and *Llanvihangel Abercourn*, in the ſaid county, to have and to hold the ſame to her, *her heirs and aſſigns for ever*. Alſo I give and deviſe unto my ſaid wife all that meſſuage and lands called *Pantyrathro*, and all that meſſuage and lands called *Dyffryntravel*, in the pariſh of *Llanſtephen*, in the county of *Carmarthen*, to have and to hold to my ſaid wife, *her heirs and aſſigns for ever*." He then gives her in the ſame words his other tenements in the pariſh of *Langunaock*, which are particularly deſcribed in the will, and alſo the tenement of *Nantyreagle*, which is there particularly deſcribed. Then follows, "Alſo I give and deviſe unto my ſaid wife all my *leaſehold* eſtate, that is to ſay, the leaſe on the meſſuage and lands called

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parke, including *Prygyftydir*, and *Parkmaur*, in the faid parifh of *Treleach ar Bettws*, the leafe on the meffuage and lands called *Llancarthgimir*, in the faid parifh of *Mydrim*, and alfo the leafe in the meffuage and lands called *Weynreed* and *Llainmarget*, in the parifh of *Llanwinio*; to have and to hold to her my faid wife, her executors, adminiftrators and affigns, to and for her and their ufe and benefit. Alfo, I give, devife and bequeath 400*l.*, together with all the intereft thereon due to me by mortgage on the meffuage and lands called *Aberarther* in the parifh of *Pembryn* in the county of *Cardigan*, unto my faid wife, her executors, adminiftrators and affigns for ever." And after thereby giving two legacies of 30*l.* and 20*l.*, alfo a legacy of 20*l.* to his brother *William*, and another of 20*l.* to his fifter *Anne*, is the following claufe. "And finally *all the reft, refidue and remainder of all my eftate and effects, real and perfonal, whatfoever and wherefoever*, not hereinbefore given and difpofed of, after payment of my debts legacies and funeral expences, I do give devife and bequeath unto my wife *Hefther Davies*, (one of the leffors of the plaintiff,) *her executors, adminiftrators and affigns, to and for her own ufe and benefit abfolutely*: and I do hereby conftitute my faid wife fole executrix," &c. The faid *Hefther Davies* on the 17th of *Feb.* 1791 intermarried with *J. Hughes*, the other leffor of the plaintiff. *William Davies* lived in *London*, and died there in *Auguft* 1788, without iffue. Soon after the death of *Grace Davies*, the faid *Anne Evans*, by virtue of the entail created by the faid *Richard Davies*, took poffeffion of all the lands and tenements in queftion, and on the 22d of *March* 1792 levied a fine of the premifes in queftion, and died on the 13th of *May* 1808, without iffue; having previoufly made her will, duly executed and attefted, by which fhe devifed

1810.

WILLIAM, Leffee of HUGHES, againft THOMAS.

1810.

William, Lessee of Hughes, against Thomas.

devised the premises in question to the defendant, who upon her death entered on and took possession of the same under the said will, and has so continued in possession of the same from thence to the bringing of this action. The lessors of the plaintiff on the 25th of *August* 1808 levied a fine sur conusance de droit cum ceo of the premises in question in this action to one *T. Waters* as conusee thereof, who previously thereto had no interest or estate in the premises: and on the 1st of *Sept.* 1808, and prior to the day of demise in this ejectment, an entry was duly made upon the premises in question on the part of the lessors of the plaintiff, for the purpose of avoiding all fines levied of the premises; which purpose was duly declared at the time of such entry. If the lessors of the plaintiff were entitled to recover possession of the premises, the verdict for the plaintiff was to stand: if not, a nonsuit was to be entered.

Owen jun. for the lessors of the plaintiff stated that the objections intended to be raised to the title were, 1st, that the reversion in fee of the premises did not pass by the will of *Thomas Davies* to his widow, one of the lessors: but if it did; 2dly, that the effect of the fine levied by Mrs. *Evans*, the tenant for life, was to disseise the reversioner, and discontinue or displace her estate: and if so, then, 3dly, that the effect of the fine of the 25th of *August* 1808, by the lessors of the plaintiff, was to confirm the estate of the disseisor, and estop their own recovery. Upon the first, there can be no doubt that by the devise in the will of *Thomas Davies*, of all the rest residue and remainder of all his estate and effects, real and personal, whatsoever and wheresoever, &c. after payment of his debts, &c. to his wife, *her executors, administrators*

1810.

WILLIAMS, Lessee of HUGHES, v. THOMAS.

strators and assigns, to and for her own use and benefit *absolutely*," the fee of the real estate passed, notwithstanding the devise is to her and *her executors*, &c.; the devise being in terms of his *real estate* to her *absolutely*, construing the words reddendo singula singulis. And he cited *The Countess of Bridgewater* v. *The Duke of Bolton* (*a*). [But Lord *Ellenborough* C. J. said that it was unnecessary to cite cases upon that point: and called upon the defendant's counsel to know whether he meant to dispute it: who admitted that the words of the residuary devise were in themselves sufficient to carry the fee in the real estate undisposed of, unless he could satisfy the Court from other parts of the will that there was no such intention in the testator.] On the 2d question the case is, that *Anne Evans*, the last tenant for life in possession under the will of *Rd. Davies*, levied a fine of the premises in question in 1792, but did not die till *May* 1808, without issue; having previously devised to the defendant, who took possession on her death; and that fine is meant to be set up as a disseisin of the lessors of the plaintiff. But without going the length of that which is intimated in *Taylor* v. *Horde* (*b*), that there can be no such thing as a disseisin in modern times, without the election of the party injured so to consider it, it is sufficient to say that there does not appear to have been any disseisin in this case. The lessors of the plaintiff had a vested interest in the reversion before the fine levied by Mrs. *Evans* in 1792, who was then in possession: the possession was not changed by her fine, but continued in her till her death; and she devised to the defendant. *Littleton*, s. 279. defines disseisin to be "properly where a man entereth into lands where his entry is not

(*a*) 6 *Mod.* 106. 1 *Burr.* 107—119.

1816.

WILLIAM, Lessee of HUGHES, against THOMAS.

not congeable, and ousteth him who hath the freehold." And Lord *Coke* in his Comment notes that every entry is no disseisin, unless there be an ouster also of the freehold; as an entry and a claimer or taking of profits. Now the tenant for life levying a fine, it cannot be said that her entry was not lawful; for in fact she made no entry, being already in possession; and her continuing in possession during her life could not be said to be a disseisin of the reversion expectant on her death. Lord *Coke* (a) defines disseisin to be "the putting out of a man out of seisin, and ever implieth a wrong." [*Bayley* J. How can a person be said to be put out of seisin, who was not entitled to the actual seisin at the time?] It should seem not. A remainder-man cannot be put out of possession who never was in possession. Lord *Coke* says, in another place (b), "a disseisin is a wrongful putting out of him that is *actually* seised of a freehold:" but a remainder-man or reversioner is not *actually* seised, and therefore Mrs. *Hughes* the reversioner cannot be said to have been disseised. Even an entry on another, without an expulsion, will not, according to the opinion of Lord *Holt* (c), work a disseisin, though it will give the party a seisin in law sufficient to have the possession adjudged to him if he have the right. But here there was neither an entry on nor an ouster of her in remainder; and the tenant for life could not disseise herself. It may be argued that a feoffment by tenant for life disseises the reversioner; and that Lord *Coke* (d) says that a fine is a feoffment of record. But though it be so in form, it is not so in substance;

(a) *Co Lit.* 153 *b.* Vide *Doe* v. *Danvers*, 7 *East*, 312.
(b) *Co. Lit* 277. *a.*
(c) *Anon.* 1 *Salk.* 246. and *Page* v. *Heyward*, 2 *Salk.* 135.
(d) *Co. Lit.* 10.

and

1810.

WILLIAM, Lessee of HUGHES, against THOMAS.

and Ld. *Coke* had before (*a*) distinguished between a feoffment, which cleareth all disseisins and other wrongful and defeasible estates, where the entry of the feoffor is lawful; and a fine, which he says, does not: the material difference between them was shewn by Ld. C. J. *Willes* in delivering the unanimous opinion of the Judges in the House of Lords upon the case of *Parkhurst* v. *Smith* (*b*); and by Ld. C. J. *Lee* in delivering the opinion of this Court in the same case (*c*), where the operation of a fine is put in opposition to that of a feoffment. And in 9 *Vin. Abr.* 456. Entry, E. *pl.* 23. it is said, that a fine is a feoffment of record only by fiction of law; for if another be in by tort, it will not amount to an entry, as a feoffment shall: per *Bridgman* C. J. *Cart.* 176. The ground of the distinction is that a fine is secret; but a feoffment derives its force from its publicity; for it is of no effect without livery of seisin. *Co. Lit.* 7. *a.* And in *Fermor's* case (*d*), the case of *Lanne* v. *Toker* is referred to, wherein it was adjudged that where tenant for life levied a fine with proclamations, and 5 years passed in his lifetime; yet he in remainder should have 5 years to make his claim after the death of tenant for life (*e*). And it was also agreed, that if tenant for life make a feoffment in fee to one who had lands in the same town, and the feoffee levy a fine with proclamations, it should not bind the remainder-man, but he should have 5 years after the death of the tenant for life; for he could not know of what land the

(*a*) *Co. Lit.* 9. *a.*

(*b*) *Willes*, 342.

(*c*) 18 *Vin. Abr.* 413, 414

(*d*) 3 *Rep* 78. *b.* 79.

(*e*) The same point was adjudged in *Smy* v. *June*, *Cro. Eliz.* 220. "for "(say the justices) it may be that the remainder-man had no conusance "of the forfeiture; and if he had, it is at his election if he will take ad-"vantage of it: and so *Zome's* case was cited to be adjudged, 7 *Eliz.*:" and the opinion of the Court in the late case of *Goodright* v. *Forrester*, 8 *East*, 566. is to the same effect.

1810.

William, Lessee of Hughes, against Thomas.

fine was levied: though where one pretending title to land *enters and disseises another*, and afterwards with intent to bind the disseisee levies a fine with proclamations, this fine shall bind the disseisee by the express purview of the stat. 4 *H.* 7. if he neither enter nor pursue his action within 5 years. Here therefore Mrs. *Hughes* had 5 years to make her entry in after the natural determination of Mrs. *Evans*'s life estate by her death. The nature of disseisin by election is fully explained in *Taylor* v. *Horde* (*a*). The utmost effect of a fine levied by tenant for life is to displace the estates in remainder; leaving to the remainder-man a right of entry, to be exercised either immediately in respect of the forfeiture of the estate for life incurred by reason of the fine, or within 5 years after the natural determination of the estate for life (*b*). In *Goodright* v. *Forrester* (*c*) there was a change of possession, which distinguishes it from the present case. If any person were a disseisor in this case, it must be the defendant; and by the stat. 32 *H.* 8. *c.* 33. the right of entry of the party entitled is not tolled even by a descent from a disseisor, unless such disseisor had peaceable possession for 5 years after the disseisin without the entry or continual claim of the party entitled. And here there has been no descent; nor have 5 years elapsed since the death of the tenant for life. *Noy's Max.* 34. *pl.* 16. Neither is there any discontinuance; for the party discontinuing must be actually seised of an estate of inheritance in the estate discontinued: therefore in *Driver* v. *Hussey* (*d*), a fine levied by tenant

(*a*) 1 *Burr.* 107—119., and vide *Co. Lit.* 330. *b.* n. 1. per totum to the conclusion of the note in p. 340. *b.*

(*b*) *Focus* v. *Salisbury*, *Hardr.* 401, 2. *Co. Lit.* 327. *b.* and *Goodright* v. *Forrester*, 8 *East*, 552. were cited.

(*c*) *Ib.* 557.

(*d*) 1 *H. Blac.* 269. and note 1 to *Clerk* v. *Pywell*, 1 *Saund.* 319.

 for

1810.

WILLIAMS, Lessee of HUGHES, *against* THOMAS.

for life was held to be no discontinuance of the estate tail in remainder, which could only be discontinued by the fine of one who was actually seised at the time by force of the entail. [*Bayley* J. It is quite clear that a fine by tenant for life cannot work a discontinuance of the estate in remainder.] Then 3dly, supposing there could have been a disseisin of Mrs. *Hughes*'s estate in reversion by the fine levied by Mrs. *Evans* the tenant for life; still the fine sur cognizance de droit, &c. levied by Mrs. *Hughes* and her husband in *Aug.* 1808; no use being declared, nor any change of possession, and without any consideration moving from the conusee, who had no prior estate in the premises; would, notwithstanding her disseisin, enure to the use of herself and her husband as conusors, and not to the use of the disseisor: or if it did not enure to the use of the conusors, it would at least be inoperative. *Beckwith*'s case (*a*); *Armstrong* v. *Wolsey* (*b*); *Roe* v. *Popham* (*c*), *Co. Lit.* 23. *a.* *Villers* v. *Beaumont* (*d*), 13 *Vin. Abr.* 299. Fine. I. a. and *Argoll* v. *Cheney* (*e*). The defendant's counsel will rely on what is said at the end of *Buckler*'s case in 2 *Rep.* 56.—" Sixthly, *it was said* that if the disseisee levy a fine to a stranger, the disseisor shall retain the land for ever: for the disseisee, against his own fine, cannot claim the land, and the conusee cannot enter; for the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage." Now that was not a point in judgment; for the case there was that *A.*, tenant for life, leased for 4 years to *B.*, and then granted the reversion for his own life from a day subsequent to *C.*, to whom *B.* attorned: and after the 4 years

(*a*) 2 *Rep.* 56. *b.* (*b*) 2 *Wils.* 19. (*c*) *Dougl.* 24.
(*d*) *Dy.* 146. *b.* (*e*) *Latch.* 82.

 expired

1810.

WILLIAM, Lessee of HUGHES, against THOMAS.

expired, *C.* entered and leased at will to *D.*, to whom *A.*, tenant for life, levied a fine come ceo, &c.; on which the remainder-man in fee entered. Lord *Coke* says, that *five* points were resolved; the two first of which only it appears were necessary to decide the case: but after stating the five, the *sixth* is noticed in the manner above mentioned. There are three other reports (*d*) of the same case, which make no mention of any such point: and in fact the remainder-man recovered in ejectment, upon the forfeiture of the tenant for life by conveying a greater estate than he had.

W. E. Taunton, contrà, as to the first point, admitted that the general words of the residuary clause would be sufficient to carry this reversion in fee, if the intent of *Thomas Davies*, the devisor, did not appear (as he contended it did) from other parts of the will, not to pass it. And here he relied on the previous devise of other lands to the wife "*and her heirs* and assigns for ever;" which shewed that he knew how to pass the fee by proper terms when he so intended: whereas the devise of the residue, by which alone the reversion in fee of the lands in question could pass, if at all, to the wife, was to her, "*her executors, administrators, and assigns.*" [Ld. *Ellenborough* C.J. The devises to her in the first part of the will were all of lands that passed into possession immediately.] They were so: but if he contemplated this reversion at all, it is more likely that he would have included it in that part of his will where he devised the rest of his property to her in fee. Again, in another part he gives a *leasehold* interest to his wife in part of the very premises in question,

(*a*) 2 *And.* 29. *Cro. Eliz.* 450. 585. and *Moor*, 423.

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1810.

WILLIAM, Lessee of HUGHES, against THOMAS.

called *Plasyparke* (*Place y parke*). It does not appear whether any lease was outstanding on those premises at the time; and none could have been granted by him that would not have terminated with his life. [*Bayley* J. Supposing he had a beneficial interest in a lease on those premises, and the ultimate reversion in fee after the intermediate estates for life and in tail, what inconsistency would there be in his devising the leasehold interest first, and afterwards the reversion by the general clause.] He gives the subject matter of the residuary devise, subject to *debts*, *legacies*, *and funeral expences*; which shews he could not have contemplated a distant reversion. [Lord *Ellenborough* C. J. The words being large enough to pass the reversionary interest, it will pass of course, if nothing appear upon the face of the will to restrain those words.] Then, as to the effect of the fines, the lessors of the plaintiff are estopped from recovering the reversion; because when they levied the fine of *Aug.* 1808, the premises were in possession of the defendant as a disseisor; and if the disseisee before actual entry made levy a fine to a stranger, such fine will enure by law to the disseisor. [2dly.] As to the disseisin, it is not necessary to rely on the single fact of the fine levied by Mrs. *Evans*, the tenant for life, in 1792, as constituting of itself the disseisin of the reversioner: it was at any rate a forfeiture of her life estate; and she having nevertheless continued in possession, and afterwards devised the premises to the defendant, his subsequent entry and possession upon her death, under her fine and will, at all events amounted to a disseisin (*a*): otherwise there can be no disseisin committed at the present day. It falls within the definitions of a disseisin which have been referred to from *Littleton* and

(*a*) Vide *Page and Jourden*'s case 1 *Leon* 142.

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1810.

WILLIAM, Lessee of HUGHES, against THOMAS.

Lord *Coke*. [Lord *Ellenborough* C. J. All the definitions include an *ouster* of the tenant, *a wrongful putting of him out*: and there lies your difficulty: there is an entry of the one party, but what ouster or putting out of the other is there?] This keeping out of the lawful owner after the death of the tenant for life is technically speaking an intrusion, and every intrusion, as well as every abatement, is in law a disseisin. [Lord *Ellenborough* C. J. asked what authority (*a*) he had for that position.] In their nature they are the same, and the difference is more in circumstances than in substance. [Lord *Ellenborough* C. J. Perhaps the reversioner might elect to treat this as a disseisin, but he is not bound to do so.] Where there has been a pre-existing privity of estate, to which the possession of the wrongdoer might be attributed, there the party wronged may elect not to treat such possession as a disseisin; but where there was no such privity, but the true owner is put or kept out wrongfully by a mere stranger to the estate, it is difficult to understand how there can be any election to treat the adverse possession of the stranger as lawful. 1 *Roll. Abr.* 659. *l.* 5. states, as an instance of disseisin, a stranger taking in his hand the ring of the door of a house left locked by the owner, and saying that he claimed the house to him in fee, without entering. This possession of the defendant was sufficient to give him a seisin. 5 *Com. Dig. Seisin* A. [*Bayley* J. What act has the defendant done that necessarily required the *freehold* to be in him, or that necessarily shews him to be any more than a mere possessor. He has not attended

(*a*) *Littleton, s.* 396, 397. points to a material distinction in respect to the right of entry of the lawful owner, between the case of an abatement and of a disseisin, after a descent cast. And vide *Co. Lit.* 277. for the definitions of abatement, disseisin, and intrusion.

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1810.

WILLIAMS, Lessee of HUGHES, against THOMAS.

the lord's court as a freeholder. Lord *Ellenborough* C.J. All that is stated here is, that on the death of the tenant for life the defendant entered and took possession: it is indeed added, that he did so *under the will* of Mrs. *Evans*; but that merely shews the occasion of his entry: he did not proclaim or announce to others that he entered as claiming the freehold, nor turn any person out of possession.] The doctrine of disseisin is founded on feudal tenure, which required that there should always be a visible tenant of the freehold, ready to perform the military services to the lord: and the defendant was the only person who could have been called upon to perform those services before the abolition of them by the legislature. But though now abolished, the principle of that law applies equally to the visible tenant in possession, holding in his own right. It cannot vary the case, whether the right owner be turned out of possession, or kept out by one who will not deliver it up. Then [3dly] taking the defendant to have been a disseisor at the time, the fine levied by Mrs. *Hughes* extinguished her right of entry, according to the 6th resolution in *Buckler*'s case (*a*) before cited. [*Bayley* J. The intention there was to levy the fine to the use of the stranger.] That does not differ the case: nor the rule that where there is no consideration moving from the conusee and no declaration of uses, the fine shall enure to the use of the conusor; for that only applies where the fine is legally levied by a conusor in possession. In *Nicholas Moore*'s case (*b*) husband and wife being tenants in special tail, with remainders over, the husband discontinued and died; after which the wife levied a fine: and it was resolved, that though the stat. 32 *H.* 8. *c.* 28. would

(*a*) 2 *Rep.* 56. (*b*) *Palm.* 365.

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1810.

WILLIAM, Leffee of HUGHES, against THOMAS.

have operated to have protected the entry of the wife after his death, notwithftanding the difcontinuance; yet that till her entry there was a difcontinuance of her eftate, and that her fine levied before entry during fuch difcontinuance barred her entry, and fo fortified the eftate of the diffeifor who claimed under her hufband. He alfo cited *The Earl of Peterborough* v. *Sir Thomas Bludworth* (*a*), where a diffeifee having levied a fine and declared the ufe by deed to the conufee, *Bridgman* C. J. held that it fhould not enure to the ufe of the diffeifor; but if no ufe had been declared, it fhould have been to the ufe of the diffeifor, and extinguifhed the right of the diffeifee. And alfo to *Weale* v. *Lower* (*b*), where, by way of illuftration of the cafe in judgment, it is recognized that the fine of a diffeifee to a ftranger operates to the benefit of the diffeifor in poffeffion.

Lord ELLENBOROUGH C. J. The firft ftep of the defendant fails, in making out that there has been any diffeifin at all. Suppofing there had been a diffeifin, a further queftion has been argued, as to what would have been the effect of the fine levied by the diffeifee; whether it would have enured to the ufe of the diffeifor (*c*): but if there were no diffeifin the whole of the argument falls to the ground. Now here tenant for life levied a fine, and continued in poffeffion till her death; having devifed to the defendant,

(*a*) 1 *Lev.* 128. (*b*) *Pollex.* 66.

(*c*) By *Popham* and *Gawdy* J., *Goulfb.* 162. If during the diffeifin, the diffeifee, where he hath nothing but a right, levy a fine to a ftranger, the diffeifor fhall not take advadtage of it. And by *Brampfton* and *Croke* Js. in *Fitzherbert* v. *Fitzherbert*, *Cro. Car.* 484. the fine by a diffeifee to a ftranger fhall not enure to the benefit of the diffeifor, but to the ufe of the conufor himfelf; for otherwife a diffeifin, being fecret, may be the caufe of difinherifon of any one who intends to levy a fine for his own benefit.

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1810.

WILLIAM, Lessee of HUGHES, *against* THOMAS.

who after her death entered and continues in possession; and this is contended to be of necessity a disseisin: but what act has he done to make him a disseisor? The lessor of the plaintiff never was in possession, and therefore could not be disseised or put out of possession. It does not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the lord's court. But what act of notoriety is here stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder? It would be carrying the doctrine of disseisin further than any other case has done to say, that the mere taking of the rents and profits, as devisee of the land, is a disseisin; without meaning to do this adversely to the party entitled; for it does not even appear that when he entered he knew of the lessor's claim. A previous point was made, upon which there can be no doubt, and which was abandoned in the course of the argument, relative to the lessor's title under the will of *Thomas Davies*. It was properly admitted that the words of the residuary devise, giving all the rest of his estate and effects real and personal, whatsoever and wheresoever, not before disposed of, to his wife, her executors, &c. for her own use and benefit absolutely, were competent to carry this reversion, unless rebutted by something else in the will shewing that he did not mean to pass it. But the omission of the word *heirs* in that clause, which is introduced in others, is relied on for this purpose. But where the words of the residuary clause are so strong and clear for carrying the fee in this reversion, we cannot collect a contrary intent from

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1810.

William, Lessee of Hughes, against Thomas.

the mere omission of the word *heirs*, which is fully supplied by other words. Then, the reversion in fee having passed to the lessor Mrs. *Hughes*, and no disseisin of her having been made which could in any manner give an effect to the fine levied by her in favour of the defendant, that fine, there being no use declared of it, enured to her own benefit.

Grose J. No one can look at the words of devise to the wife in the residuary clause, without seeing that the devisor meant to give her all his real estate absolutely which he had not before disposed of, and consequently to include this reversion in fee: and there is nothing in the rest of the will to shew that he meant to give her less. And here was no disseisin by the defendant; for he never meant, by any thing which appears, to disseise the lessor Mrs. *Hughes*.

Le Blanc and Bayley, Justices, concurred.

Postea to the Plaintiff.

1810.

The KING *against* The GLAMORGANSHIRE Canal Company.

Thursday, Feb. 8th.

By the act for making and maintaining the *Glamorganshire* Canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, maintaining, improving, and using the canal, and other works;" and the company were required to lay before the Sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an *annual account* of the rates collected *and of the charges and expences of supporting, maintaining, and using the navigation and its works:* and the Sessions are authorized, in case it appears to them that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the company (*i. e.* in making and completing the canal and its works,) to reduce the canal rates: held that the Sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expences, stated in the annual account of disbursements, for *new* works, such as a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected *for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons.* Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the Sessions.

THIS case came on upon a rule, drawn up on several affidavits, and papers, including an account current delivered by the defendants to the Quarter Sessions for the county of *Glamorgan* in the year 1802, and two annual accounts of receipts and payments ending *Mich.* 1807 and *Mich.* 1808, returned into this court by certiorari at the instance of the defendants; by which the prosecutors were ordered to shew cause why an order of Sessions for reducing the rates to be taken by the company under the act of the 30 *Geo.* 3. *c.* 82. for making and maintaining a navigable canal from *Merthyr Tidvil* to and through the *Bank*, near *Cardiff*, in the county of *Glamorgan*, should not be quashed for insufficiency.

By that act the defendants are incorporated as a company for the making, completing, and maintaining the canal, according to the rules and directions expressed in the act, "*and to supply the said canal with water while the same shall be making and when made;*" and the act contains the usual powers for making such reservoirs, feeders, and aqueducts, and setting up such engines and other

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1810.

The King *against* The Glamorganshire Canal Company.

machines for fupplying the fame with water, "and for "any other purpofes neceffary for the faid canal, as to "the company fhould feem neceffary and proper;" "*and all fuch other works*, matters, and conveniences, *as* "*they fhall think neceffary and proper* for *effecting, complet-* "*ing, maintaining, improving, and ufing the faid canal and* "*other works.*" And they were alfo empowered "to "make, and repair, fupport, vary, or alter fuch refer- "voirs, engines, &c. and other works, as and when the "company fhould think requifite and convenient for the "purpofes of the faid navigation." The company were in the firft inftance limited to raife 60,000*l.* for thefe purpofes; and if that were not fufficient, they might raife 30,000*l.* more amongft themfelves: and the act limited the tonnage and wharfage rates to be taken by the company for goods carried upon the canal. Then, after limiting the dividends of the company upon their capital to 8*l.* per cent. "upon all fuch money as fhall be actually expended in making and completing the faid navigation and the feveral works relating thereto," &c., the act proceeds—"and in order to afcertain the amount of the "clear profits of the faid navigation, the company fhall "caufe to be entered in a book a true and particular ac- "count of the charges and expences of obtaining the act, "*and of all money already laid out, and which fhall from* "*time to time be laid out and expended in or anyways relating* "*to the making and completing the faid canal, and of all* "*charges and expences which fhall from time to time be in-* "*curred on account of the faid navigation, and the feveral* "*works thereunto belonging, previous to and until the fame* "*fhall be made and completed.* And the company are alfo "required from *Michaelmas* next after the expiration of "two years from the time of completing the faid canal

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1810.

The KING *against* The GLAMORGANSHIRE Canal Company.

" to cause a true exact and particular account to be kept, " and annually made up and balanced to the 29th of " *Sept.* of the *rates* collected by virtue of the act, and of " the *charges and expences attending the supporting, maintaining, and using the said navigation and the several works* " *thereunto belonging;*" which is to be laid before the justices at their *Mich.* Sessions next after the making up such annual account: " *and if by any such annual account it* " *shall appear to the justices at such Sessions that the clear* " *profits of the said navigation shall upon the average of three* " *years then next preceding have exceeded the rate of* 8l. *per* " *cent. upon all such money as shall appear by the first-mentioned account to have been laid out and expended as aforesaid; the said justices shall and are hereby authorized by their* " *order at such Sessions to make such reduction in the rates to* " *be collected by virtue of the act for one year then next, as in* " *the judgment of the said justices shall be sufficient; so that* " *the clear profits of the said navigation for that year may be* " *as near* 8l. *per cent. upon the money which shall by the said* " *first-mentioned account appear to have been expended as* " *aforesaid as may be.*" And the company are prohibited from taking any higher rates. For the better ascertaining the truth of the said accounts, the said justices at any Sessions, when and as often as they shall think fit, may authorize any person to examine the account books of the company, and take copies, and examine witnesses on oath.

A subsequent act passed in the 36 *G.* 3. enabling the company to extend their navigation, and to raise a further capital of 20,000*l.* within two years; but limiting the dividend thereon to 5*l.* per cent.

It appeared by the affidavits that when the accounts of the receipts and expenditures of the company were returned

1810.

The King *against* The Glamorganshire Canal Company.

turned to the *Mich.* Seſſions in 1802, the actual capital expended by the company amounted to 103,600*l.* But by an order made after examination of the accounts at an adjourned *Mich.* Seſſions in *Dec.* 1802, that Court ſtated that the ſum actually laid out by the company in making and completing the canal, which they had declared to be ſo completed ſince the 31ſt of *December* 1798, amounted to 96,340*l.* And that Mr. *J. Wood* on behalf of the freighters of the canal having offered to give evidence that 15,175*l.* and other ſums, part of the ſaid ſum of 96,340*l.* principal, had been improperly laid out by the company, and ought not to be allowed, the Court were of opinion that they ought not to go into the ſame, but reſerved a caſe thereon for the opinion of this Court. But upon the removal of this order by certiorari into this Court, it was quaſhed. After this, annual accounts were delivered in at the *Mich.* Seſſions, containing accounts of the rates collected and of the charges and expences attending the maintaining and uſing the navigation and works thereto belonging. The laſt of theſe, on which the queſtion aroſe, was the account from *Mich.* 1808 to *Mich.* 1809, in which was included, amongſt other items of expence objected to, amounting altogether to above 9700*l.*, *a new ſteam engine and a reſervoir for better ſupplying the canal with water*; the items of which charges were carried to the *annual account of diſburſements by the company.* Certain freighters upon the canal objected before the Seſſions to theſe items, on the ground that the acts of parliament under which the company were incorporated did not authorize any further expenditure for *new* works, as the time for completing the canal had expired; though it appeared that the company had not divided more than they were entitled to do by the ſaid acts; and that theſe

new

1810.

The KING *against* The GLAMORGANSHIRE Canal Company.

new works were erected *for the support and improvement of the original line of canal, and the better supplying it with water in dry seasons*, and not for any extension of that line. But though it appeared that the surplus, after paying these disbursements, was not quite sufficient to pay the authorized dividends, the justices at their last *Mich.* Quarter Sessions, disallowing the sums for such new works, which turned the balance, made an order for reducing the rates; which order stated in substance, that having had laid before them the annual accounts of the company, made up and balanced to the 29th of *Sept.* last, of the rates collected and received by virtue of the act of parliament, and of the charges and expences attending, and for supporting, maintaining, and using the said navigation, and the several works thereunto belonging; and it appearing to the said justices by the said annual account and by the annual accounts of the said company by them laid before the justices at their *Michaelmas* Quarter Sessions in 1807 and 1808, that the clear profits of the said navigation have upon the average of three years next preceding the said 29th of *Sept.* 1809 exceeded the rate of 8*l.* per cent. per ann. on the first year's account in 1803 of the sums expended by the company in making and completing the canal, and all charges of navigation, and the works thereto belonging previous to and until the same were made and completed: therefore the justices ordered such reduction of the rates to be made as therein stated, as in their judgment would be sufficient, so that the clear profits of the said navigation for the year ensuing might be as near 8*l.* per cent. as might be upon the money which by the said account appeared to have been so expended.

This order having been removed by certiorari into this court, the question upon the respective affidavits and documents was reduced to this, whether the Sessions in

 estimating

1810.

The King *against* The Glamorganshire Canal Company.

eſtimating the receipts and diſburſements could exclude from the latter the expences of thoſe *new* works which had been made with a view to the ſupporting and improvement of the old line of canal, and for better ſupplying it with water, as ſo much added to the capital of the company after the period when the original works were declared to be completed with the capital then inveſted: and whether the company were ſtrictly confined to the repair and ſuſtentation of the original works conſtructed with the original capital?

Garrow and *Abbott* ſhewed cauſe againſt the rule, and contended that the object of requiring the accounts of the capital expended in completing the canal and the original works, and of the charges and expences of maintaining them, to be laid before the ſeſſions, was to enable them to reſtrain the company by their order from taking more than the ſtipulated dividends on the capital actually advanced by them for the purpoſes of the act; and to take care that the amount of the capital on which the dividends were calculated was not enhanced by ſums expended out of the rates upon new works; and that the allowance of diſburſements for charges and expences ſhould ſtrictly be confined to the neceſſary ſupport and repair of the original works, and not be extended to cover new works and improvements, the expence of maintaining which would hereafter add to the annual charges, and defer the reduction of the rates in which the public were intereſted: the act, therefore, properly conſtituted the Seſſions judges of the neceſſity and utility of any new works to be erected after the original ſcheme was declared to be completed, and the company entitled to collect the rates. The original ſum to be expended in making the canal and its works was limited by the firſt act, and extended afterwards

wards to a certain amount; but if the company by raiſing their full rates can expend ad libitum the ſurplus after paying the limited dividends in making new works in which the members of their own body may have a perſonal intereſt, they may inveſt a capital in the concern much beyond the intentions of the legiſlature: they may undertake collateral cuts. [*Le Blanc* J. That would exceed the authority given them by the act.] So it is an exceſs of their authority if they erect unneceſſary works upon the proper line. [Lord *Ellenborough* C. J. The company are to judge of the particular works "neceſſary and proper for effecting, completing, maintaining, improving, and uſing the canal and other works." Suppoſe an additional lock was found wanting, are they not to judge of that? You require us to read the act as if the Seſſions were appointed the judges of the propriety or fitneſs of the particular works, admitting ſuch works to have been erected for the purpoſe of maintaining and uſing the canal. But I do not conceive that to have been the meaning of the act. Is there not a middle line to be taken? The account is afterwards to be laid before the Seſſions "of all charges and expences *attending* "*the ſupporting, maintaining, and uſing the ſaid navigation* "*and the ſeveral works thereunto belonging*:" they are to judge, therefore, whether the charges and expences ſtated in that account are charges and expences attending the *maintaining and uſing* of the navigation authorized by the act, or wholly irrelevant to it. If, indeed, the new works were merely colorable, I ſuppoſe the counſel for the company will not contend that the Seſſions would not have power to diſallow ſuch charges. *Le Blanc* J. The new works are not for the purpoſe of giving the canal a new line, but merely for the better ſupplying of the original canal with water, which may have failed

1810.

The KING *against* The GLAMORGANSHIRE Canal Company.

from accidental caufes. *Bayley* J. Thefe are fairly charges for ufing the canal. Lord *Ellenborough* C. J. The legiflature muft certainly have contemplated the making and fupport of a canal which fhould be always full of water and ufeable, and not one which fhould have its dry periods: and thefe works were for the purpofe of making the canal at all times ufeable.] The profecutor's counfel then admitted, that if the Court were fatisfied that the new refervoir and fteam engine were works made for the ufing of the canal, the charges ought to have been allowed: but they objected that this Court could not review the judgment of the Seffions upon this, which was a matter of fact within their jurifdiction to decide.

Lord ELLENBOROUGH C. J. We may always exercife a control over the judgment of the Juftices below in thefe matters, when we fee clearly that they have proceeded upon a wrong principle or rule in afcertaining the quantum of rates fubmitted to their inquiry. There is no doubt upon this act of parliament, that the company may erect new works in furtherance of the purpofes of the old line of navigation: but the judgment of the Seffions in difallowing thefe charges has proceeded upon the con fideration, that the company could not execute any new works for thofe purpofes: that is an erroneous principle; for though the works may be new in fpecie, yet being for the maintenance of the old canal and works, the company were authorifed to make them. If, indeed, there appeared to be any ground to fufpect that the works had been colorably executed for the benefit of individuals, and ufed for collateral purpofes, in fraud of the benefit in which the public had a right to participate, after payment of the fair expences of fupporting, maintaining, and ufing the canal navigation and its works, and of di-

1810.

The KING *against* The GLAMORGANSHIRE Canal Company.

viding the ſtipulated profits of 8*l.* per cent. on the capital advanced under the firſt act, and of 5*l.* per cent, on the capital advanced under the ſecond act, we ſhould look at any extenſion of the works with great jealouſy, and ſhould repudiate every charge for ſuch as appeared to have been ſo colorably executed: but that does not appear to have been the caſe in this inſtance; and the Seſſion having proceeded upon a wrong principle in rejecting the charge for theſe works, their order muſt be quaſhed (*a*).

The other Judges concurred.

The Attorney-General, *Hall*, and *Maule*, appeared for the company.

(*a*) Vide *Rex* v. *The Conſervators of the River Tone*, 8 *Term Rep.* 286.

WHITEHEAD and Others *againſt* FIRTH.

Thurſday, *Feb.* 8th.

The affidavits made in anſwer to a rule niſi for an attachment muſt be intituled on the *civil* ſide of the court in the cauſe out of which the motion ariſes, but after the rule for the attachment is granted, the affidavits in any matter concerning ſuch attachment are intitled on the crown ſide.

Upon a ſubmiſſion by bond of all matters in difference between the parties in a cauſe, without making any mention of *coſts*, the arbitrator has no authority to award coſts as between attorney and client. But the plaintiff waving his coſts, and having only demanded the principal ſum awarded, took his attachment for that ſum.

AFTER action brought, the parties entered into a general ſubmiſſion by bond, which was made a rule of Court, to refer all matters in difference between them; but nothing was ſaid as to coſts. The arbitrator made his award in favour of *Whitehead* and others, the plaintiffs in the action, and gave them coſts as between attorney and client. Croſs motions were afterwards made in this Court; one by *Topping* on the part of *Firth*, to ſet aſide the award, on the ground that the arbitrator had exceeded his authority in giving coſts at all, but at all

1810.

WHITEHEAD and Others *against* FIRTH.

events in giving any other cofts than as between party and party: the other by *Burrough*, on the part of *Whitehead* and the others, to enforce the performance of the award by attachment. Both the rules now came on together; when it appeared that the affidavits to fet afide the award were intitled, "*In the matter of Firth and Whitehead and others*," to which no objection was made (*a*). But the affidavit againft the rule for the attachment being intitled, "*The King againft Firth*," the reading of them was objected to on the ground that they were wrongly intitled in that manner; for that the king was no party to the proceeding until the rule for the attachment was made abfolute; and that the affidavits againft the rule nifi for the attachment ought to have been intitled on the civil fide in the caufe or matter out of which the motion arofe; which was the rule laid down in *Wood* v. *Webb* (*b*), *The King* v. *The Sheriff of Middlefex* (*c*), and *The King* v. *Harrifon* (*d*), though the practice was afterwards incorrectly ftated to be otherwife in a note to *Bainbrigge* v. *Halton* (*e*).

The Court, upon this laft point, faid that upon confideration of the cafes, and adverting to the principle of the thing, the cafe could not be in the crown office until the attachment was granted. That *The King* v. *Harrifon* was a much ftronger cafe than this, for there the affidavits read

(*a*) According to the received notion of the practice, as there was a caufe in court, the affidavits to fet afide the award ought to have been intitled in that caufe: but where there is no caufe in court, but only a fubmiffion by bond to an award made a rule of court under the ftatute, the affidavits may be intitled *in the matter*, &c, though they need not be intitled at all.

(*b*) 3 *Term Rep.* 253.
(*c*) 7 *Term Rep.* 439.
(*d*) 6 *Term Rep.* 60.
(*e*) 5 *Eaft*, 21.

1810.

WHITEHEAD and Others against FIRTH.

in anfwer to a rule for a criminal information were not intitled at all.

With refpect to the other objection, againft the award itfelf, they faid that as, if *cofts* in general terms had been exprefsly mentioned in the fubmiffion, it muft have been taken to mean fuch cofts as the Court would have awarded between party and party; fo, nothing being faid of cofts, though the arbitrator was, according to the cafe of *Roe* v. *Doe* (*a*), confidered to have an incidental power of awarding cofts where an action was depending; yet the omiffion could not be confidered as giving him a greater power to award cofts as between attorney and client, than he would have had if the power of giving cofts generally had been exprefsly mentioned in the terms of the fubmiffion. But they defired *Burrough* to look into the cafes, and fee if there were any authority for fupporting the award on this ground: and though he offered to wave that part of the award, yet the Court would not give him his rule for the attachment at that time.

Burrough, on a fubfequent day, faid he had looked into the cafes upon the point, and muft admit that the cafe of *Marder* v. *Cox* (*b*) was an authority againft him, to fhew that the arbitrator, even under an exprefs general power to award *cofts*, could only give cofts of the caufe as between party and party, and not as between attorney and client. And as by the cafe of *Candler* v. *Fuller* (*c*), it alfo appeared that the arbitrator could not, without an exprefs authority, award the cofts of the reference; he was content to wave the award for fo much: and as the

(*a*) 2 *Term Rep.* 644. (*b*) *Cowp.* 127.

(*c*) *Willes*, 62. But it has been fince held in *Wood* v. *O'Kelly*, 9 *Eaft*, 436. that under a rule of reference in which *the cofts were directed to abide the event of the award*, the Mafter might tax the cofts of the reference as well as of the caufe.

 demand

1810.

WHITEHEAD and Others *against* FIRTH.

demand on the defendant had only been made for the ſum awarded, without the coſts, he was ſtill entitled to the attachment as to the principal ſum awarded. This was aſſented to by *Topping*, upon an agreement that the rule for the attachment ſhould lie in the office for a certain time.

Friday, Feb. 9th.

POOLE *againſt* BENTLEY.

An inſtrument containing words of preſent demiſe will operate as a leaſe, if ſuch appear to be the intention of the parties, though it contain a clauſe for a future leaſe or leaſes; as where the one *thereby agrees to let*, and *the other agrees* to take land for 61 years at a certain rent for building, and the tenant agreed to lay out 2020*l* within 4 years in building 5 or more houſes, and when 5 houſes were covered in the landlord agreed to grant a leaſe or leaſes, (which might be for the more convenient underletting or aſſignment of the leaſes,) but *this agreement was to be conſidered binding till one fully prepared could be produced.*

IN an action for the uſe and occupation of certain land, &c. which was tried before Lord *Ellenborough* C J. at *Weſtminſter*, the only queſtion was, whether a memorandum in writing upon a 16*s*. ſtamp, ſigned by the plaintiff and defendant, by virtue of which the defendant was let into poſſeſſion, were a leaſe of the premiſes, or only an agreement for a leaſe? If it were a leaſe, it ought to have had a ſtamp of a different and higher denomination. Lord *Ellenborough* C. J. being of opinion that it was a leaſe, as containing words of preſent demiſe, and appearing on the face of it to have been intended to operate as ſuch, nonſuited the plaintiff. And upon a rule niſi being granted for ſetting aſide the nonſuit, which was moved upon the authority of *Goodtitle d. Eſtwick* v. *Way* (*a*), the memorandum appeared to be in the following terms. "Memorandum of an agreement this 12th of *June* 1806, between *J. Poole* and *P. Bentley*. The ſaid *J. Poole hereby agrees to let* unto the ſaid *P. Bentley*, and the ſaid *P. Bentley agrees to take* of the ſaid *J. Poole*, all that piece of land (deſcribing it) *for the term of* 61 *years from Lady-day next*, at the *yearly rent* of 120*l*. free and clear of all taxes, &c., the ſaid rent to be paid quarterly; the firſt quarter's rent within 15 days after *Michaelmas* 1807. *And that for and in conſideration of a leaſe to be granted by*

(*a*) 1 *Term Rep* 735.

the

the ſaid J. Poole, *for the ſaid term of years, the ſaid* P. Bentley *agrees*, within the ſpace of 4 years from the date hereof, to expend and lay out in 5 or more houſes of a third rate or claſs of building 2000*l.*: *and the ſaid* J. Poole *agrees to grant a leaſe or leaſes of the ſaid land and premiſes as ſoon as the ſaid 5 houſes are covered in: and the ſaid* P. Bentley *agrees to take ſuch leaſe or leaſes, and to execute a counterpart or counterparts thereof. This agreement to be conſidered binding till one fully prepared can be produced.*" Signed by both parties and witneſſed.

Park and *Reader* were to have ſhewn cauſe againſt the rule; but the Court called upon

Garrow and *Storks*, contrà, to ſupport their objection to the nonſuit; who relied on the caſe before cited, where though the inſtrument contained the ſame words of preſent demiſe as the one in queſtion, yet as it provided for a leaſe to be executed in futuro, it was held to operate only as an agreement for a leaſe, and not as a leaſe itſelf. The intention of theſe parties appears to have been, that the defendant, who was to take the ground upon a building leaſe, ſhould have the preſent poſſeſſion of it for the purpoſe of erecting the houſes; but in order to ſecure his performance of the terms, he was not to have the legal intereſt conveyed to him until five at leaſt of the projected buildings were covered in. They alſo referred to *Doe d. Bromfield* v. *Smith* (*a*), where a ſimilar conſtruction was put upon an inſtrument which referred to a future leaſe: and other caſes are there mentioned to the ſame effect.

(*a*) 6 *Eaſt*, 530.

Lord

1810.

Poole *against* Bentley.

Lord Ellenborough C. J. The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction: and here their intention appears to have been that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties: though when a certain progress was made in the buildings, a more formal lease or leases, in which perhaps the premises might be more particularly described for the convenience of underletting or assigning, might be executed. The case of *Goodtitle* v. *Way* is the strongest in favour of the plaintiff's construction; in which, however, the exact date of the instrument does not appear: but the stipulation was that leases, with the usual covenants, were to be executed before *Michaelmas*, and the rent which was to be paid half-yearly was not to commence till *Lady-day*, though the tenant was to be let into possession immediately, which looked to a payment under the leases to be granted. The agreement also regarded several leases to be executed in future. In the case last cited there was *a clause to be added to the lease*: and all the other cases contain circumstances of distinction.

The other Judges concurred.

Rule discharged.

LEGGE *against* THORPE.

Friday, Feb. 9th.

A protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects, in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of affairs between them unascertained at the time which might then have afforded probable ground of belief to the drawer that his bill would be honoured.

THIS was an action by the indorsee of a foreign bill of exchange against the drawer, and the declaration stated the bill as drawn by the defendant in *Upper Canada* on the 26th of *May* 1807, on *C. B. Wyatt*, at one month after sight, for 21*l.* payable to *Alex. Legge* or order, for value received; and that it was indorsed by *A. Legge*, the payee, to *Wm. Legge* the plaintiff, and afterwards presented to *Wyatt* for acceptance, who refused to accept or pay the same. And then the plaintiff averred, that at the time of making the bill, and from thence until and at the time when the same was so presented to *Wyatt* for acceptance, and from thence until and at the time for payment thereof as aforesaid, he, *Wyatt*, had not in his hands any effects of the defendant, nor had he received any consideration from the defendant for the acceptance or payment by him of the said bill, nor hath the defendant sustained any damage for or by reason of his not having notice of the non-acceptance or non-payment by *Wyatt* of the said bill; of all which premises the defendant had notice, by means whereof, and according to the usage and custom of merchants, the defendant became liable to pay to the plaintiff the said sum of 21*l.* &c.; and in consideration thereof promised, &c.

It appeared at the trial before Lord *Ellenborough* C. J. at *Guildhall*, by the evidence of *Wyatt* the drawee, that he had refused to accept the bill because he had no effects of the drawer's in his hands; but it appeared also that

1810.

LEGGE *against* THORPE.

Wyatt was one of the executors of a Mr. *Weeks*, who died in *Canada* leaving property, and that this bill had been drawn in favor of *A. Legge* by the defendant in consequence of the defendant's having, at the desire of the executors, employed *A. Legge* to do some carpenter's work on an outbuilding belonging to the house which the defendant had rented of *Weeks* before his death, with whom he had made an agreement that the rent reserved was to be laid out in certain improvements of the premises, the value of which had amounted to much more than the rent: but *Wyatt* having come to this country, and *A. Legge* wishing to remit the money to his brother here, the bill in question had been drawn in the expectation that *Wyatt* would discharge it; there being sufficient assets of the testator. *Wyatt* however disputed the existence of assets in his hands to answer the bill. It was objected on the part of the defendant that he was not liable, for want of a protest, though he had no effects in specie in the hands of the drawee, but only (as he contended) a reasonable expectation and equitable claim to have the bill accepted and paid; this being the case of a foreign bill of exchange, which by the custom of merchants required a protest at all events to make the drawer liable. But Lord *Ellenborough* C. J. considering that a protest was not necessary in the case of a foreign bill where notice of the dishonour would not be necessary in the case of an inland bill; overruled this objection, and a verdict was taken for the plaintiff; reserving leave to the defendant to move to set it aside and enter a nonsuit, if the Court should be of opinion that there ought to have been a protest. A rule nisi was accordingly obtained for this purpose; against which

Garrow

1810.

LEGGE *against* THORPE.

Garrow and *F. Pollock* now ſhewed cauſe, and inſiſted that foreign and inland bills of exchange ſtood on the ſame foot in this reſpect : the proteſt neceſſary to be made in general in the one caſe, and the notice of the diſhonour to be given in the other, are the ſame thing in effect ; the proteſt being only the formal and accuſtomed manner of notifying the diſhonour of the bill : the reaſon is the ſame in both caſes, being founded on the ſuppoſition that the drawer has effects in the hands of the drawee, and therefore to enable the drawer on receiving the accuſtomed notification of the diſhonour to withdraw his effects out of the hands of the drawee as ſpeedily as poſſible. Then, if there be no ſuch effects in hand, there can be no more reaſon for the accuſtomed notification of the diſhonour in the caſe of a foreign than there is in the caſe of an inland bill, where it is admitted not to be neceſſary. And they referred to *Rogers* v. *Stephens* (*a*), *Gale* v. *Walſh* (*b*), and *Orr* v. *Maginnis* (*c*), as eſtabliſhing or recognizing the uniformity of the rule.

Park and *D. Pollock*, for the defendant, ſaid it had been declared to be a ſubject of regret from high authority (*d*), that the old rule, requiring notice of the diſhonour of a bill by the drawee to be given in all caſes to the drawer, had ever been broken in upon : the exception, however, where the drawee has no effects of the drawer in his hands, is too well eſtabliſhed in the caſe of inland bills to be now ſhaken : but it is ſtill not too late (there being

(*a*) 2 *Term Rep.* 713. (*b*) 5 *Term Rep* 239.

(*c*) 7 *Eaſt*, 359, and *vide* another caſe on a foreign bill of exchange referred to by *Buller* J. in *Bickerdike* v. *Bollman*, 1 *Term Rep.* 410. as tried before him at *Guildhall.*

(*d*) *Vide* what was ſaid by Lord *Ellenborough* C. J. in *Orr* v. *Maginnis*, 7 *Eaſt*, 362., which was now ſaid to refer to Lord *Eldon*, when at the bar : and *vide* the report of the principal caſe, at niſi prius. 2 *Campb.* 311.

only

1810.

LEGGE *against* THORPE.

only one exprefs decifion by the Court on the point) to revert back to the old rule in refpect of foreign bills, which ought to be governed entirely by the cuftom of merchants recognized in foreign courts, by which a proteft is always held neceffary (*a*), and in fome of them the proteft itfelf is made evidence of the facts contained in it. In the cafe of *Orr* v. *Maginnis* the modern exception, even with refpect to inland bills, was narrowed: and now it is fettled to be no excufe for not giving notice of the difhonour, that the drawer had no effects in the drawee's hands at the time when the bill was refufed acceptance, if he had any effects, to whatever amount, in the drawee's hands when the bill was drawn. [*Bayley* J. That cafe did not proceed upon any diftinction between foreign and inland bills of exchange.] In *Walwyn* v. *St. Quintin* (*b*), Ld. C. J. *Eyre* affigns ftrong reafons why notice of the difhonour, which he confidered to be part of the fame cuftom of merchants which created the duty, and which is therefore peculiarly applicable to the proteft for the difhonour of a foreign bill, ought never to be difpenfed with; namely, that the grounds of fuch difpenfation cannot generally be known to the holder at the time of the omiffion to give notice. And he cautions billholders not to rely on it as a general rule that, if the drawer has no effects in the acceptor's hands, notice is not neceffary: and inftances feveral cafes where notice would ftill be deemed neceffary. It is impoffible in the prefent cafe to fay that no inconvenience could have refulted to the defendant from the want of notice through the

(*a*) Vide *Brough* v. *Parkins*, 2 *Ld Ray*. 993 by *Holt* C J, a proteft on a foreign bill is part of the cuftom; but on an inland bill no proteft was neceffary by the common law; but by the ftat. 9 & 10 *W*. 3. *c* 17. Note, that ftatute requires either a proteft, or otherwife due notice to be given of the difhonor.

(*b*) 1 *Bof.* & *Pull.* 654, 5.

the accuftomed form of a proteft; for he would then have loft no time in feeking his indemnity out of the affets of the teftator in *America*.

Lord ELLENBOROUGH C. J. This is an action by the indorfee againft the drawer of a foreign bill of exchange, which was refufed acceptance; and the queftion is whether the drawer can protect himfelf againft the payment of it for want of a proteft? The fact is, that the bill was not drawn for actual value in the hands of the drawee, and yet the drawer was not altogether unwarranted under the circumftances, in expecting that his bill might be honoured, fo that there is no imputation upon him for having drawn the bill. I do not mean to fay that actual value in the hands of the drawee at the time of drawing is effentially neceffary to entitle the drawer to notice in cafe of the difhonor; for circumftances may exift which would give a drawer good ground to confider that he had a right to draw a bill upon his correfpondent; as where he had configned effects to him to anfwer the bill, though they may not have come to hand at the time when the bill was prefented for acceptance. But the defendant does not appear to have ftood in any fuch fituation as would entitle him to draw this bill; for he had no effects at the time in the drawee's hands, nor had taken any means to furnifh him with any: and therefore the queftion dryly is, whether without effects in hand, or that which might be deemed an equivalent, a proteft were neceffary in this cafe, being that of a foreign bill. But it has already been decided in the cafe of *Rogers* v. *Stephens* not to be neceffary; and that if notice to the drawer of non-acceptance be not neceffary, for want of his having effects in the hands of the drawee, neither is that fpecial mode of notifying the difhonour, called a proteft, neceffary. I have often regretted that the

the strict general rule requiring notice of the dishonour to be given was departed from in the case of *Bickerdike* v. *Bollman*, on account of the drawer having no effects in the hands of the drawee; because, though I do not question the foundation on which that distinction rests, after the sanction which it has since received; yet I meet with continual instances of inconvenience resulting in practice from it. It has often happened to me, sitting at nisi prius, to be obliged to take an account between the parties, in order to see whether there were any and what funds, or more properly speaking, whether the drawer had probable funds left in the drawee's hands to answer the bill: whereas if the courts had adhered to the original simple rule, all such inquiries would have been unnecessary, and no doubt would have existed in any case; for in every action upon an inland bill against the drawer, the plaintiff must have shewn notice to him of the dishonour; and in every action on a foreign bill, he must have shewn a protest. In *Bickerdike* v. *Bollman* indeed the Judges did not merely consider it as a case of the drawer not having in fact value in the hands of the drawee at the time, but as a species of fraud to draw a bill on one on whom he knew that he had no authority to draw, for the purpose of negotiating it. If one party draw on another without any prospect of having value in the other's hands to answer it, he knows beforehand that his bill will not be honoured; and therefore notice cannot be necessary to tell him that which he must know already, not only that he had no value, but that he could have none which could warrant him to draw the bill. Then the case of *Rogers* v. *Stephens* decided that there was no difference in this respect between inland and foreign bills. Here then the defendant having drawn the bill with previous knowledge

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that he had no effects in the drawee's hands, and that his bill would be dishonoured, no protest was necessary to give him notice of it.

1810.

LEGGE *against* THORPE.

GROSE J. The cases of *Bickerdike* v. *Bollman*, and *Rogers* v. *Stephens*, have decided the present.

LE BLANC J. The Court in *Bickerdike* v. *Bollman*, considering the difficulty of giving notice of the dishonour in all cases, (for instance, where the drawer himself is dead, or keeps out of the way and cannot be found,) as a reason against the universality of the rule, looked to the reason for which notice was required to be given, and therefore laid down the rule, not generally, that where the drawer had no effects in the hands of the drawee at the time, (which perhaps might turn out to be the case upon a future settlement of accounts between them,) no notice of the dishonour should be given; but that it need not be given where the drawer must have known at the time that he had no effects to answer his bill. That has been acted upon ever since in the case of inland bills: and in *Rogers* v. *Stephens* the same rule was held to extend to foreign bills: and the subsequent cases of *Gale* v. *Walsh*, and *Orr* v. *Maginnis*, were in effect confirmatory of the decision in *Rogers* v. *Stephens*; for the effort in both was to take the case out of the general rule, by shewing the fact that the drawer had no effects in the hands of the drawee. There may perhaps be an inconvenience in adopting a rule upon this subject in our courts which is not acted upon in foreign courts, as to dispensing in these cases with the production of a protest; if any subject of this country should thereby be led to omit making and sending out a protest, in order to charge the drawer of a foreign bill in another country: but that would only take place where it

1810.

LEGGE *against* THORPE.

was neceſſary to inſtitute proceedings againſt the drawer in a foreign court which did not adopt our rule; and is an inconvenience which muſt be left to the prudent precaution of the parties intereſted to provide againſt.

BAYLEY J. Before the caſe of *Bickerdike* v. *Bollman* the application of the general rule to all caſes was often attended with great injuſtice; for perſons drew bills in payment of juſt debts upon others in whoſe hands they had no effects, and on whom they had no right to draw, and then if it happened that they did not receive due notice of the diſhonour, they could not be ſued; although in fact they had ſuffered no loſs from the want of ſuch notice. To remedy this the rule was laid down in that caſe, that where the drawer had no effects at the time in the hands of the drawee, and could have no reaſon to believe that his bill would be honoured; as he could not be injured for want of notice of the diſhonour, it was not neceſſary to be given by the holder. The ſame rule was applied to foreign bills above 20 years ago, in the caſe of *Rogers* v. *Stephens*, and has prevailed ever ſince. It was acted upon in *Gale* v. *Walſh*; for at firſt it did not appear there that the drawer had no effects in the drawee's hands, and the rule for a nonſuit was made abſolute in the firſt inſtance, for want of proof of a proteſt for non-acceptance; but it was afterwards opened again upon a ſuggeſtion that the fact of there being no effects in the drawee's hands at the time would appear upon the Judge's notes: that fact however did not appear upon the report; and therefore the rule ſtood for entering a nonſuit. But the opening of the rule ſhews that it was then fully underſtood that if there had been no effects of the drawer in the hands of the drawee at the time, the want of a proteſt

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for non-acceptance would have been no bar to the plaintiff's recovery against the drawer. Such then having been the acknowledged rule ever since the case of *Rogers* v. *Stephens*, and that, upon a matter recurring perhaps many times in every day, and where the rule itself is calculated to further justice between the parties, it would be attended with very great inconvenience if it were now to be altered.

Rule discharged.

RANDALL *against* LYNCH.

Friday, Feb. 9th.

Where a ship was let to freight by charterparty from the plaintiff to the defendant, a clause in the deed—" and " it is hereby " *covenanted and* " *agreed by and* " *between* the " said parties, " that 40 *days* " *shall be al-* " *lowed* for unloading and loading again, " &c.," was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time the owner's remedy is upon that covenant, and not in assumpsit, as upon an implied new contract.

THE plaintiff declared in covenant on a charterparty sealed, made the 1st of *March* 1809, whereby the plaintiff, master of the ship *Albion*, let, and the defendant, a merchant, hired to freight, the said ship on a voyage from *London* to *Lancerotto*, one of the *Canary Islands*, &c. there to deliver her outward cargo to the freighter's agents, and to load her homeward cargo, and return therewith to the port of *London*, and upon arrival there, at the *London* docks, after regular report being first made at the custom-house, make a faithful delivery of the said homeward cargo to the said freighter, &c. Then, after stating the covenant for payment of freight to the master according to certain rates, there followed this covenant: " And it is hereby covenanted and agreed *by and between the said parties that* 40 *days should be allowed* for unloading, loading, and again unloading the said cargoes, to commence and be computed at *Lancerotto* from and including the day after the said master should be ready to make discharge of his cargo to be landed there, and notice thereof to the freighter's agent, &c.; to commence again on the day

1810.

RANDALL *against* LYNCH.

day of her being ready to take in her homeward cargo, &c.; and to commence in *London* from the day of reporting at the cuſtom-houſe, &c. And likewiſe it was agreed between the ſaid parties that it ſhould be lawful for and at the option of the freighter to detain the veſſel for ten working days over and above the hereinbefore ſtipulated 40 days, upon paying the ſaid maſter 5*l*. per day for each of the ſaid 10 overlying days, or days of demurrage." The plaintiff then made the proper averments of performance of what was required to be done on his part during the voyage; and concluded with this averment, that afterwards on the 10th of *Auguſt* in the year aforeſaid the veſſel arrived with her homeward cargo at the port of *London*, that is to ſay, at the *London* docks, and then and there made a regular report at the cuſtom-houſe, and was then and continually afterwards ready and willing to have made a faithful delivery of the ſaid homeward cargo to the freighter, &c.; of which the defendant then and there had notice: and although the plaintiff afterwards began to make, and on divers other days afterwards, viz. until and upon the 10th of *October* in that year, at the *London* docks aforeſaid, made a faithful delivery, &c. and then ended and completed both the outward and homeward voyages, &c.: yet, &c.: and ſo the plaintiff proceeded to aſſign ſeveral breaches; the fourth of which charged, that the defendant did not nor would unload, load, and unload again the ſaid reſpective cargoes of the ſaid veſſel within the 40 days in the charterparty mentioned and ſtipulated and allowed for thoſe purpoſes, computed as therein mentioned, and the 10 working days over and above the ſaid ſtipulated 40 days; but kept and detained the ſaid veſſel with a part of the homeward-bound

cargo

1810.

RANDALL *against* LYNCH.

cargo on board her in the *London* docks (*a*) aforesaid for 35 days after the expiration of the 40 days and 10 days; whereby the plaintiff during all the time last aforesaid lost the use and profit of his vessel, contrary to the form and effect of the charterparty and of the defendant's covenant in that behalf made; to the plaintiff's damage, &c. The defendant by his pleas (inter alia) took issue upon the fact of such detention above the 40 days and 10 days; which being found against him, and damages assessed thereon at the trial before Ld. *Ellenborough* C. J. in *London*; it was on a former day in this term moved by

The Attorney-General to arrest the judgment; and the rule was now endeavoured to be supported by him, *Garrow*, and *Barrow*, on the ground that the breach alleged, for keeping the vessel beyond the 40 lay days and the 10 demurrage days, was larger than the covenant declared on; the covenant being only that 40 days should be allowed to the freighter for loading and unloading the vessel, and 10 days for demurrage; and no covenant that he would not keep it longer, or that he would deliver it up at the end of that time: and therefore they contended, that the action of covenant would not lie in this case for a detention beyond the days allowed; but that the plaintiff's remedy was by an action of trover, or on the case, as for a tort, or by assumpsit as upon a new and distinct contract by implication. And they asked whether covenant could be maintained against a lessee by indenture for holding over after the end of his term.

(*a*) The principal question at the trial on this part of the case was, whether the defendant were liable for a detention of the ship in the *London* docks; which detention was owing to the great press of business in the docks at that time, by which the company were prevented from unloading this vessel sooner. But he was held liable upon his covenant. *Vide* S. C. 2 *Campb. Ni. Pri. Cas.* 352.

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1810.

RANDALL *against* LYNCH.

But *the Court*, (ſtopping *Park*, *Topping*, and *Marryat*, againſt the rule, who ſhortly referred to *Stevenſon's* caſe (*a*),) were clearly of opinion that there was an implied covenant in the charterparty not to detain the ſhip beyond the ſtipulated number of days; and that the action was properly framed in covenant, and not in aſſumpſit.

Lord ELLENBOROUGH C. J. A covenant is nothing more than an agreement of the parties under ſeal; and if they covenant together that it ſhall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he ſhall not detain it for a longer time, but ſhall then give it up to the owner: if then he detain it beyond that time, it is a breach of his covenant. The poſſeſſion of the ſhip beyond the ſtipulated time by the freighter was only unlawful as being againſt his implied covenant that he would not detain it longer than that time.

GROSE J. agreed.

LE BLANC J. There is an expreſs covenant between theſe parties that a certain time only ſhould be allowed

(*a*) 1 *Leon.* 324. *The plaintiff* had covenanted with the defendant, *that it ſhould be lawful* for the defendant to cut wood for fire and hedge bote, *without making any waſte, or cutting more than neceſſary*; and the defendant gave bond to the plaintiff, conditioned *to perform all covenants*. The plaintiff ſued on the bond, and aſſigned for a breach of that covenant, that the defendant had committed waſte in cutting wood: to which exception was taken that the condition only extended to covenants to be performed on the part of the leſſee. But the exception was diſallowed; *for it is the agreement of the leſſee*, although it be the covenant of the leſſor. And vide *Pordage* v. *Cole*, 1 *Saund.* 319. If it be *agreed* (by writing under ſeal) between *A.* and *B.*, that *B.* ſhould pay *A.* a certain ſum for his lands on a particular day; this amounts to a covenant by *A.* to convey the lands, as being the words of *both* parties, by way of agreement.

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to the defendant to detain the ship: his detention of it therefore for a longer time is in breach of that covenant.

1810.

RANDALL *against* LYNCH.

BAYLEY J. Where there is an express contract by deed between the parties, assumpsit cannot be maintained on any promise arising by implication of law out of the terms of that contract.

Rule discharged.

ELIZABETH WANT, Widow, and GASKOIN, Executrix and Executor of WILLIAM WYATT WANT, deceased, *against* BLUNT and Others.

Monday, Feb. 12th.

The rules which govern the construction of conditions to create real estates do not apply to personal contracts, which must be performed according to the words and apparent meaning of the parties, and are not satisfied by a performance cy-pres.

THIS case was argued in the last term by *Comyn* for the plaintiffs, and *Raine* for the defendant. The argument turned upon the particular words of the contract. The Court took time to consider of their opinion, which was now delivered by

Lord ELLENBOROUGH C. J. This came before the Court on a special case, reserved at the trial of an action of covenant on two policies of insurance, each dated the same

Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society *during his life*; and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premiums, on the quarter days, *during his life*, and if *he* should also pay his proportion of contributions which the *members* of the society should *during his life* be called on to make in order to supply any deficiences in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any *member* neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless *the member* (*continuing in as good health as when the policy expired*) paid up the arrears within six months, and 5*s.* per month extra: held that a member insuring, having died, leaving a quarterly payment over due at the time of his death, the policy expired; and that a tender of the sum by the member's *executor*, though made *within 15 days after it became due*, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member *in his lifetime, continuing in as good health as when the policy expired.*

1810.

Want and Another, *against* Blunt and Others.

ſame day, viz. the 6th of *June* 1796. At the trial before me in *Middleſex* after the laſt *Trinity* term a verdict was found for the plaintiffs for 1000*l.* damages; ſubject to the opinion of this Court on the following facts. On the 6th *June* 1796 the defendants, being three of the committee of the Life Aſſurance Society for the benefit of widows and female relations, executed a policy, reciting that *Wm. Wyatt Want* of *Windſor had become a member of the ſociety*, according to the deed of ſettlement of 19th *Dec.* 1795, inrolled in the Court of King's Bench, and had propoſed to make aſſurance with the ſaid ſociety for an annuity of 50*l.* to be paid to *Elizabeth* his wife for her life, in caſe ſhe ſhould ſurvive him; and had delivered in a declaration, ſetting forth their reſpective ages, and his ſtate of health; and reciting that the ſociety had conſented to aſſure ſuch annuity *in conſideration of a quarterly premium of* 2l. 13s. 6d. *to be paid to the ſociety during the life of the ſaid* W. W. Want. The policy then recites that *W. W. Want* had executed the ſaid deed of ſettlement, and had paid the premium for one quarter of a year from the date of the policy: thereupon the defendants, whoſe names were ſubſcribed to the policy and their ſeals affixed, being three of the committee for managing the affairs of the ſociety, did, for and on behalf of the ſaid ſociety, covenant, promiſe, and agree to and with the ſaid *W. W. Want, his executors and adminiſtrators*, that if *he* ſhall well and truly pay or cauſe to be paid to the clerk and receiver of the ſociety for the time being the full ſum of 2*l.* 13*s.* 6*d.* *on every* 25*th of* March, 24*th of* June, 29*th of* September, *and* 20*th of* December, *during the life of the ſaid* W. W. Want, or *within ſuch time after thoſe days reſpectively as is or ſhall be allowed for that purpoſe* by the rules of the ſaid ſociety; and if he ſhall alſo pay and contribute

WANT and Another *against* BLUNT and Others.

contribute his proportion of the monies which *the members* of the society shall, *during his life*, be called upon to pay *and contribute*, according to the rules, towards making good any deficiency of the funds of the society to answer the claims upon it; and shall in all other respects observe the rules and by-laws of the society; then, on due proof being made of the death of the said *W. W. Want*, the committee of the society for the time being shall and will well and truly pay out of the stock and funds of the society unto the said *Elizabeth* or her assigns, after his death, in case she shall survive him, one clear annuity of 50*l.* during her life by equal quarterly payments on the 25th of *March*, 24th of *June*, 29th of *September*, and 20th of *December*, in every year; the first payment to be made on such of those days as should first and next happen after the decease of the said *W. W. Want*. Added to the policy was a N. B. that, by the rules of the society, if any member neglect to pay the quarterly premiums for 15 days after the same become due, the policy will be void, *unless the member* (continuing in as good health as when the policy expired) *pay up within 6 calendar months then next all arrears*, together with 5*s.* for every month elapsed after such premium became due, or 5*s.* for the time elapsed, if less than a month. There was another policy of the same tenor and date for another like annuity of 50*l.* By the rules of the society it was amongst other things declared and agreed, that if *any member* of that society should neglect to pay any quarterly premium, which should be payable for any assurance, for the space of 15 days after the same should become due, then the policy should cease and determine, and the assurance be void to all intents and purposes, unless *the member making*

such

1810.

Want and Another *against* Blunt and Others.

such default should within 6 calendar months next ensuing (continuing in as good health as at the time the policy was suffered to expire) pay up all arrears of such premiums, together with 5*s.* for every month which should have elapsed.

The case then states that continually from the time of making the two policies the quarterly premiums therein mentioned, which respectively became due before and on the 29th of *Sept.* 1808, were duly paid within the time allowed for that purpose: but that the quarterly payments which became due on the 20th *Dec.* 1808 were not paid at the time they became due. That *W. W. Want* died on the 25th *Dec.* 1808. That he did not in his lifetime pay, or tender, or offer to pay, the said quarterly premiums, which became due on the 20th *Dec.* 1808, or either of them: but that on the 27th *Dec.* 1808, *which was after his death*, but *within* 15 *days after the said 20th* Dec., when they had become due, *the said two quarterly premiums were tendered* and offered to be paid *by the executors* of said *W. W. Want* to the clerk and receiver of the said society, (to whom also due proof of his death was offered) who refused to receive them.

This case has been argued, on the part of the plaintiffs, on the ground of its being, or bearing an analogy to a case of a condition annexed to a real estate: and it was said that the premium to be paid by the assured was a condition *to create* an estate; that is, that the annuity to the wife for her life was to depend on the previous payments of the quarterly premiums by the husband, and which were to create, as it were, the annuity for the life of the wife; and that such conditions need not be strictly performed according to the letter; but that it is sufficient

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if such conditions be performed as near to the condition as may be, and according to its intent and meaning; although the letter and words of the condition cannot be performed; different from conditions which are to destroy an estate; for those are to be taken strictly. And authorities (*a*) were cited in support of such distinction, as to conditions annexed to real estates. But we are of opinion that the analogy does not hold in the present case, and that the rules applicable to conditions with respect to land do not apply. This is a contract of assurance, and must be construed according to the meaning of the parties expressed in the deed or policy. It is an insurance on the life of the husband, not, as usually is the case, of a certain sum of money payable on the event of his death during the continuance of the policy or insurance; but of an annual payment of his wife, for her life, in case she shall survive him, to commence from and after his decease. *The risk* insured against is *his death*; and the premium is a quarterly payment to be made *by him* to the society, who are the underwriters, during *his* life. The duration of the insurance is so long as *he* shall continue to make those quarterly payments: but the insurance is not to be void if *he* pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. The rules of the society, as stated in the case, are, that if any member should neglect to pay any quarterly premium for the space of 15 days after the same should become due, then the policy and assurance thereby made should absolutely cease and be void

(*a*) *Shep. Touch.* 140, 1. and *Lit. s.* 334. 337. And the cases of *Tarleton* v. *Staniforth*, 5 *Term Rep.* 695, and *Salvin* v. *James*, 6 *East*, 571., were also cited in the argument.

1810.

WANT and Another against BLUNT and Others.

to all intents and purposes; unless *the member making such default* should within 6 calendar months then next (*continuing in as good health as when his policy was suffered to expire*) pay up all arrears of such quarterly premiums, and also 5*s*. for every month, and fraction of a month, which should have elapsed since such premium became due. This is the only rule of the society allowing any further time beyond the quarter day: and by this rule it seems to be allowed to the *assured or member* to keep his assurance on foot and his policy in force, on the terms of simply paying up the quarterly premium, if the neglect has not exceeded 15 days after the same became due, without any additional penalty, and without the condition, which is imposed in case of longer neglect, *of being in as good state of health as when his policy expired.* But the plaintiff contends, and her whole case depends on making out that point, that by the true construction of this rule of the society, and the clause in the policy referring to it, it is not necessary that *the party whose life is insured should himself* pay or cause to be paid the premium within the 15 days, or in fact be alive at the time it is paid; but that it is sufficient if *any other person* interested in the insurance should cause it to be paid within the 15 days, though the event insured against might then have happened. In order to determine this point, it is material to consider, 1st, Whether, at the time of the death of the person insured, the policy were or were not expired; because if the policy were expired at the time, the defendants cannot be held liable. Now the insurance is for a quarter of a year, and so on from quarter to quarter, and it expires at the quarter day: such is the clear understanding of the parties, as expressed in the rule of the society referred to by the

1810.

WANT and Another against BLUNT and Others

the policy, and ſtated in the caſe; viz. (continuing in as good health *as when his policy was ſuffered to expire*), that muſt refer to the quarter day up to which only the premiums had been paid, and cannot include the further term of 15 days which muſt be covered by the further premium; each premium being for an inſurance for a quarter of a year only, and not for a quarter and 15 days. To this point the caſe of *Tarleton and Others* v. *Staniforth and Others*, 5 *T. Rep.* 695. is an authority. So that the death of *Want* happened during a period not covered by the policy; viz. on the 25th of *Dec.* Again, by the conſtitution of this ſociety every perſon making an inſurance on his life becomes *a member* of the ſociety, and executes the deed of ſettlement, as it is ſtated in the policy, that *W. W. Want* had done in this caſe; and is liable to contribute to anſwer the claims made on the ſociety: and the committee, that is, the defendants, covenant with *Want* to pay the annuity to his widow after his death, if he ſhall pay the quarterly premiums on the days ſpecified, or within the time allowed by the rules of the ſociety; and if he ſhall alſo pay and contribute his proportion of the monies, which the members of the ſociety ſhall *during his life* be called upon to pay and contribute, according to the rules of the ſociety, towards making good any deficiency. It is clear, therefore, that he was only to contribute to ſuch claims as *the members* of the ſociety ſhould be called on to pay *during his life*; and if any calls had been made on the 26th of *Dec.* they could not have affected him or his eſtate; and yet after he has ceaſed to be a member of the ſociety, it is inſiſted that a payment may be made on his behalf, to revive the liability of the ſociety to ſome perſon at the time of payment of the premiums

1810.

WANT and Another *against* BLUNT and Others.

miums not a member of the society. The whole tenor of the policy and rules and orders shews that no person can be assured *without being a member.* It is a society insuring each other. The first step required is to sign the deed of settlement, and become a member; and then the premium is paid by him as a member of the society. So that no person, except he or she be a member of the society, is entitled to make assurance with them; and the paying a premium for another quarter is making a new assurance, though under the former policy. The whole frame of the policy, too, shews that every premium must be paid during the life of the assured. The agreement for the insurance stated in the beginning of the policy is in consideration of a quarterly premium of 2*l.* 13*s.* 6*d.*, to be paid *during the life of* W. W. Want. The covenant of the defendants to pay the wife's annuity, after *Want's* death, is "if *Want* shall pay or cause to be paid the quarterly premium on every quarter day, *during the life of* Want, or within such time after as shall be allowed by the rules of the society for that purpose:" in construing which sentence, the expression *during the life of* Want must be understood as applying and carried on to the latter part of the sentence, and is the same as if the words *during his life* had been repeated after the words *within such time after*, i. e. or within such time after *during his life.* It is observable that throughout the policy, the words *executors* or *administrators* are used only once, namely, in the covenant of the defendants, where they covenant with the said *Want, his executors and administrators*, to pay the annuity to his widow after his death: and there, the addition of those words was proper and necessary, inasmuch as the covenant must necessarily be enforced by his

1810.

WANT and Another *against* BLUNT and Others.

his executors or adminiſtrators; the ſame not being to be performed till after his death. In every other act to be done, it is expreſſed as being to be done *by Want*, or as being neglected to be done by *Want*, or by ſuch *member* of the ſociety, without any added words indicating an intention that it ſhould be any other than the perſonal act or neglect of the aſſured. For theſe reaſons we are of opinion, that the death of *W. W. Want*, which happened on the 25th of *Dec.*, was during a period of time not covered by the policy; and that on the true conſtruction of the policy and rules of the ſociety, the inſurance could not be continued beyond the expiration of the quarter, which ended on the 20th of *Dec.*, by a tender of the premium by his executors after his death, though within 15 days after the quarter day; ſo as to include within the policy the period of his death. The conſequence is that judgment of nonſuit muſt be entered.

1810.

Monday, Feb. 12th.

The KING *against* The Inhabitants of the County of BUCKS.

The inhabitants of a county are bound to repair every *public* bridge within it, unless, when indicted for the non-repair of it, they can shew by their plea that some other person, or body politic or corporate, is liable; and every bridge *in a highway* is, by the statute of bridges, 22 *H.* 8. *c.* 5. taken to be a *public* bridge for this purpose.

Therefore where Queen *Anne*, in 1708, for her greater convenience in passing to and from *Windsor* Castle, built a bridge over the *Thames* at *Datchet, in the common highway* leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before: held that the inhabitants of the county of *Bucks*, who, in answer to an indictment for the non repair of that part of the bridge 13 years afterwards, pleaded these matters, and traversed that the bridge was a common public bridge, were bound to rebuild and repair it.

THIS was an indictment for not repairing the half-part of *Datchet Bridge* lying in the county of *Bucks*.

The defendants by their plea, protesting that the bridge indicted, called *Datchet Bridge*, was a common public bridge, and that the same never was used for all the subjects of the king by themselves, and with their horses, carriages, &c. in manner and form as in the indictment alleged; pleaded that long before and at the time of erecting the bridge in question, Queen *Anne* was seised in her demesne as of fee, in right of her crown, of an ancient ferry with the appurtenances, called *Datchet Ferry*, across the said river *Thames*, at the same part thereof where the said bridge was erected, for carrying over that river all persons and their horses, carriages, &c. in boats kept by her there for that purpose for certain ancient tolls, &c. therefore due and payable: and the queen being so seised, and being desirous to relieve herself, her heirs and successors from the burthen and expence of the said ferry, &c. on the 1st of *Jan.* 1708 at her own charge erected a bridge across the said river at the same part thereof where the said ferry was situated, being the said bridge in the indictment mentioned, in order that the subjects of the queen, &c. by themselves, and with their

 horses,

1810.

The KING *against* The Inhabitants of BUCKS.

horſes, carriages, &c. might go over the ſame at their free will and pleaſure, in lieu of their uſing the ſaid ferry. That from the building of the ſaid bridge until the removing of the ſame as aftermentioned, the ſaid bridge has been repaired when neceſſary at the expence of the ſaid queen and her royal ſucceſſors. That the now king, being deſirous to remove the ſaid bridge, and in lieu thereof to re-continue and re-eſtabliſh the uſe and exerciſe of the ſaid ferry, and to receive and have the enjoyment and benefit of his tolls, &c. thereto belonging, on the 1ſt of *Jan.* 1796 did take down and remove the ſaid half part of the ſaid bridge in the county of *Bucks;* the ſaid half part being then in good repair; and carried away and converted the materials thereof to his own uſe; and did thereupon re-eſtabliſh and re-continue the uſe and exerciſe of the ſaid ferry, as the ſame was in uſe and exerciſe before the erecting of the ſaid bridge. That from the time of removing the ſaid bridge by the now king hitherto, being for 13 years and upwards, all the king's ſubjects have uſed and ſtill uſe the ſaid ferry in the ſame manner as they were accuſtomed to uſe the ſame before the erecting of the bridge; *without this* that the ſaid bridge in the indictment mentioned was a common public bridge, and uſed for all the king's ſubjects, &c. in manner and form as in the indictment charged. At the trial before Lord *Ellenborough* C. J. at *Weſtminſter*, the defendants were found guilty, ſubject to the opinion of the Court on the following caſe.

Queen *Anne* was ſeiſed in fee in right of the crown of an ancient ferry, with the appurtenances, called *Datchet Ferry*, acroſs the river *Thames*, for the paſſage over that river of all perſons, horſes, carriages, and cattle, in boats

 kept

1810.

The KING *against* The Inhabitants of BUCKS.

kept by her there for that purpose, for certain ancient tolls; and being so seised, about the year 1706 built a bridge across the river about five yards above the place where the ferry was situated. The sign manual of her majesty to the Lord High Treasurer for building the said bridge is as follows; viz.: *Anne* R. Whereas we have given directions to our trusty and well-beloved *Samuel Travers* Esq., our surveyor-general, for building a bridge at *Datchet*, near *Windsor*, over the river *Thames*, for the better conveniency of our passage to and from our castle at *Windsor*: and whereas our said surveyor hath made a computation, (which is hereunto annexed,) of what timber he thinks will be necessary to build the said bridge: and it being represented to you by *Edward Wilcox* Esq. surveyor-general of our woods on the south side of *Trent*, that there is timber in *Windsor Forest* proper and sufficient for the said works: Our will and pleasure is, and we do hereby authorize and command you to issue forth your warrant unto the said *Edward Wilcox*, directing him with the assistance of the proper officers of the said forest, to mark, fell, and cut down so much timber (unfit for the service of the navy,) in such places where the same may most conveniently be spared within the said forest, as will be sufficient for building the said bridge pursuant to the said computation hereunto annexed, and to deliver the timber when felled to the said *S. Travers*, or whom he shall appoint to receive the same, by indenture to be made between the said *S. Travers* on the one part, and the said *E. Wilcox* on the other part, &c.: and in case on converting the said timber any parts thereof be found serviceable for the navy, you are to direct the said *E. Wilcox* to deliver such timber to a proper officer of the navy by indenture

denture for the service of our navy, as hath been usual in the like cases. And you are further to direct the said *E. Wilcox* to sell the lops, tops, bark, and offal wood of the whole for the best advantage that can be got for the same for our use, and to account for the said service before the auditor of our county of *Bucks* on or before the last day of *Hilary* term next. And for so doing this shall be your warrant. Given at our court at *Kensington* the 25th day of *March* 1706, in the 5th year of our reign. By her majesty's command, *Godolphin*." This was directed to the Lord Treasurer *Godolphin*. This bridge was constantly repaired by her majesty and her royal successors, from time to time, until the year 1771, when the surveyor-general having reported to the Lords of the Treasury, "that the bridge had become ruinous, and "must of necessity be taken down: that it had been built "and always repaired by his majesty, who had frequent "occasions of passing over it;" an order was made by the Lords of the Treasury in 1772 to build a new bridge with stone piers; which bridge, being the bridge mentioned in the indictment, was finished in 1775, at an expence of 5187*l.* 6*s.* to his present majesty, who from time to time repaired the last-mentioned bridge at his own expence, until 1796, when it being much out of repair, and having given way and fallen in on the part which lies in *Buckinghamshire*, and becoming thereby wholly impassible, the wooden part of it was taken down by his present majesty, and the materials were sold or otherwise converted to his own use. The said bridge is situate in a principal highway from *London* to *Windsor*, and has always, except when it became at different times impassible for want of repair, and when it was rebuilding

1810.

The King *against* The Inhabitants of Bucks.

as aforesaid, until it was finally taken down in 1696, been used by the public on all occasions, for all purposes of passage over it, without any toll ever having been paid or demanded; and was, during the discontinuance of the ferry, the means of passing the *Thames* in the said highway, and was at all times of great public use and convenience. At the time when Queen *Anne* built the first-mentioned bridge, she discontinued the use of the ferry, and the said ferry remained so discontinued from that time until the bridge was finally taken down in 1796, when his present majesty re-established the said ferry, which hath been used for the public ever since, and still is used by them for the purpose of passing over the *Thames* at the place aforesaid. During the time the ferry hath been in the hands of the crown, the same hath been and still is maintained at the expence of the crown, and the public have at all times used the same toll free. The question for the consideration of the Court was, whether this were a public bridge, the part of which, lying in their county, the defendants were liable to repair and rebuild.

Bowen, for the prosecution, contended that this was a public bridge, and therefore the county were bound by law to repair it, unless they could throw the burthen upon some other person. The circumstances of its having been built in a public highway, having been always used by the public, and being found to be of great public convenience, establish it to be a *public* bridge within the principle of all the cases: and this conclusion is rather confirmed than otherwise, by the fact of its having been originally built by the crown for the particular accommodation of the sovereign. Even if a private man build a

1810.

The KING
against
The Inhabitants
of
BUCKS.

bridge for his own convenience, but dedicate it to the public, by ſuffering them to have the general uſe of it, and they do accordingly uſe it, and it is in fact a public convenience, the burthen of repair is thereby thrown upon the county at large. *Rex* v. *The Inhabitants of the County of Glamorgan* (*a*), the *Gluſburne Bridge* caſe (*b*), and *The King* v. *The Inhabitants of the W. R. of Yorkſhire* (*c*), eſtabliſh this doctrine. While the crown kept up the ferry, it was not competent for the county or any individual to have built a bridge in this place, as that would have been in derogation of the right of the crown to the tolls of the ferry: and in *Payne* v. *Partridge* (*d*) it is ſaid that the owner of a ferry could not let down the ferry and put up a bridge, without licence and an ad quod damnum. The crown however might do this by its prerogative; and having once erected the bridge and ſuffered the public to uſe it for their convenience, the legal conſequence follows; for it would lead to great public inconvenience if the ferry and the bridge could be ſubſtituted the one for the other from time to time. It can make no difference that the materials of the old bridge were taken away by the crown; for when the ruins of the old bridge were taken down, the property in the materials reverted to the crown, at whoſe expence the bridge had been built (*e*). But if the crown had no right to take them away, they may obtain redreſs by petition of right. Neither can the conſtant repair of the bridge ſince it was erected by the crown vary the queſtion, though it might have been uſed as an argument that the bridge was in fact built and ſuf-

(*a*) Before Lord *Kenyon* C. J. in 1788, 1 *Bac. Abr.* by *Gwillim*, 535. and 2 *Eaſt*, 356.
(*b*) 5 *Burr.* 2594. and 2 *Blac.* 687. (*c*) 2 *Eaſt*, 342.
(*d*) 1 *Salk.* 12. and 3 *Mod.* 289. (*e*) *Harriſon* v. *Parker*, 6 *Eaſt*, 154.

tained for the perfonal convenience of the fovereign: but it having become a public bridge, the liability to repair it falls of courfe on the county, as foon as the crown ceafed to repair it.

Tindal, contrà, contended that the county were not bound to repair the bridge: it was not built in the original highway, but feveral yards on one fide of it; and therefore even if built by a private perfon, it could not have been indicted as a nufance in the firft inftance. [*Le Blanc* J. How is that ftatement to be reconciled with the finding in the fpecial cafe, that the bridge is built in a principal highway?] It has become a principal highway fince by the ufing of the bridge; but taking all the circumftances of the cafe together, it appears not to have been in the highway at firft. [Lord *Ellenborough* C. J. It is ftated to be now in a principal highway from *London* to *Windfor*; and we muft prefume that it was fo from the firft ufer of it; being built for the convenient paffage of her majefty along the old highway.] Then taking it to be fo; yet, 1ft, if the queen meant to retain the dominion of the bridge to herfelf, her fuffering the public to ufe it will not make it a public bridge againft her confent. 2dly, The facts of this cafe fhew that fhe did retain the dominion of it. 3dly, Since the ftat. 1 *Ann. ft.* 1. *c.* 7. *f.* 5. there can be no grant of a bridge by the crown to the inhabitants of a county. Firft, Where the builder of a new bridge fhews by his acts that he means to retain the dominion over it, it does not become a public bridge by his merely fuffering the ufe of it by the public. The allowance to the public of a limited or temporary ufe of it would clearly not be deemed an abandonment of the

bridge

1810.

The KING against The Inhabitants of BUCKS.

bridge to them. If one who was bound to repair an ancient bridge ratione tenuræ were to build a new bridge at a little diſtance while the old one was under repair, that could not be deemed an abandonment of the new bridge, but the public would ſtill have a right of paſſage over the old bridge when repaired. So here, upon the removal of the new bridge, and the reſtoration of the ancient ferry, the right of the public to uſe the latter would be reſumed. In the caſes cited of *Glusburne Bridge* (a) and *Pace Gate Bridge* (b), they were erected for the expreſs purpoſe of being dedicated to the public uſe; and the *Glamorganſhire Bridge* (c) was ſtated to be built in the king's highway. Then, 2dly, the facts here ſtated ſhew that the crown meant to retain the dominion over *Datchet Bridge* during the time it was in exiſtence. The warrant for building it ſhews that the queen only looked to her own convenience: the bridge was conſtantly repaired by the crown; which is a continuing act of ownerſhip, and rebuts any preſumption that the crown had abandoned it to the public: in 1771 the king pulled down the old bridge, and in 1775 built the new one; and this, again, was pulled down by the king in 1796, when the materials were ſold for his majeſty's benefit; which was the moſt complete aſſertion of ownerſhip. [Lord *Ellenborough* C. J. If it had become a public bridge before that time, the miſconception of the crown as to its own right would not alter the right of the public.] It is available as evidence that the crown never meant to abandon the bridge to the public: the ſame intention was evinced by the keeping up of the ferry: it was an experiment of the ſovereign to ſee

(a) 5 *Burr.* 2594. (b) 2 *Eaſt*, 342. (c) *Cited ib.* 356.

 whether

1810.

The KING against The Inhabitants of BUCKS.

whether the ferry or the bridge beſt anſwered the purpoſe of the royal convenience. Then as the uſer of the bridge by the public from 1775 would, if unexplained, be evidence of their adoption of it; ſo the uſer by the public of the ferry ſince 1796 is alſo evidence of their re-adoption of their ancient right. 3dly, Since the ſtat. 1 *Ann. ſt.* 1. *c.* 7. *ſ.* 5. reſtraining grants of crown lands for any longer period than 31 years or 3 lives, the crown could not abandon the land on which the bridge is built in perpetuity to the county. [*Groſe* J. It is not ſtated to be crown land: it is only ſtated that the bridge was built in the public highway, which may be the land of a ſubject as well as of the crown.] The Court would rather preſume that it was the land of the crown, than that the king had invaded the property of the ſubject. [Lord *Ellenborough* C. J. If it were the land of a ſubject, his acquieſcence would be evidence of his aſſent to dedicate it to the uſe of the public. But I draw no preſumption either way: you aſſume it to be the land of the crown, in order to raiſe the argument. *Bayley* J. The title to the land may ſtill remain in the crown, though the bridge is public.] Conſidering it only as a grant of a right of paſſage, ſtill the crown could not grant it to the ſubject. [*Le Blanc* J. The queſtion does not ariſe upon the caſe, as ſtated.]

Bowen in reply obſerved that the intention of the crown to continue its dominion over the bridge cannot control the operation of law ariſing from the public uſer of it. And as to the acquieſcence of the public for the laſt 13 years in the demolition of the bridge, it could only be evidence in any caſe of a grant

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or releafe, and the public cannot grant or releafe any right. He concluded by faying that it was a cafe of confequence, and other gentlemen had taken not s for a fecond argument if the Court entertained any doubt upon it,

1810.

The KING *againft* The Inhabitants of BUCKS.

Lord ELLENBOROUGH C. J. The only queftion is, whether it were a public bridge. The cafe is of novelty fufficient to induce us to take it into further confideration; and if we fhould entertain more doubt upon it than we do at prefent, we fhall order a fecond argument.

His Lordfhip, on the laft day of term, delivered the judgment of the Court.—This was an indictment againft the inhabitants of *Buckinghamfhire* for not repairing the half of *Datchet Bridge* lying in that county. The defendants pleaded fpecially, with a traverfe that the bridge was a public one; and upon the trial before me at *Weftminfter*, a verdict was found againft them fubject to a cafe. [His Lordfhip then ftated the fubftance of the facts found in the cafe; after which he proceeded]—The queftion referved upon this cafe for the confideration of the Court is, Whether this were a public bridge, the part of which lying in their county the defendants were liable to repair or rebuild. The county not having tendered an iffue by their plea that any other defcription of perfons, i. e. that any body politic or corporate or natural perfon or perfons were liable to the repair of the bridge in queftion, the burthen of repairing the half part of the bridge which was fituate in *Buckinghamfhire* will reft upon the defendants, if it be under the circumftances a *public* burthen to be by law impofed

1810.

The KING *against* The Inhabitants of BUCKS.

impofed upon any body. And that depends upon the fingle queftion made at the clofe of this cafe, whether this were a public bridge. None of the cafes cited profefs to give an immediate definition or defcription in terms of what fhall be confidered " public bridges;" although a diftinction between a public and a private bridge is taken in 2 *Inft.* 701. and made to confift principally in its being built for the common good of all the fubjects, as oppofed to a bridge made for private purpofes; and the inftance put of a private bridge is a " bridge to a mill which *A.* was bound to maintain over which *B.* had paffage." And the words themfelves, i. e. " public bridges," do not occur in the ftat. of 22 *H.* 8. *c.* 5. called the ftatute of bridges. But the fenfe of thefe words may be very diftinctly inferred from that ftatute, which empowers the juftices of peace in their general Seffions to inquire of " all manner of annoyances of bridges broken *in the highways*," and applies to bridges of that defcription all its fubfequent provifions; and amongft others, that, which cafts upon fhires and ridings the repair of bridges fituate within them (and without any city or town corporate)" where it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parifh, nor what perfon certain or body politic ought of right to make *fuch* bridges decayed, i. e. fuch bridges *broken in highways*. Inferring therefore from the ftatute that a bridge *in a highway* is a public bridge for all purpofes of repair connected with the ftatute of bridges, we have only to refer to the cafe before us to fee whether this be a bridge in a highway. And upon fuch reference we find it exprefsly ftated to be " a bridge IN a principal *highway*," and of courfe, as public as the highway itfelf is

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in which it is ſituate, and of which for the purpoſe of paſſage it muſt be underſtood to form a part. I ſay, muſt be underſtood to form a part, becauſe if it had been a bridge built for the mere purpoſe of connecting a private mill, for inſtance, with the public highway, or for any other ſuch merely private purpoſe; although the public might occaſionally participate with the private proprietor in the uſe of it, the bridge would not merely on that account neceſſarily become a part of the highway. It has been ſaid, that this is to be conſidered as a private bridge, becauſe in the warrant of her majeſty Queen *Anne* for the building of it ſhe deſcribes it as being built "for the better conveniency of her paſſage to and from "her caſtle of *Windſor*." But if the words themſelves could be conſidered as importing a mere purpoſe of private conveyance and uſe; and which with reference to the public ſtation and dignity of her majeſty, and the public reſort which muſt be had to her in the place of her reſidence, can hardly be; yet the cotemporary as well as the immediately ſubſequent and continued uſe of this bridge on the part of the public, without any interruption, ſhews concluſively that her majeſty contemplated a more general and public uſe of the bridge which ſhe had built; indeed that ſhe contemplated an uſe of the bridge as public as that of the ferry had been, which was diſcontinued upon the erection of the bridge. But it may be aſked, is every ſort of bridge, erected as it may happen to have been for a temporary purpoſe during a time of flood or the like, and which may have rendered the ordinary fords impaſſable, or the ordinary means of paſſage impracticable, to be conſidered as a *bridge in a highway*, to be repaired when broken down, according to the pro-

1810.

The KING against The Inhabitants of BUCKS.

visions of the stat. of *Hen.* 8.? The answer is, certainly not. A merely occasional substitute of this nature, removed as soon as the temporary purpose of its erection is answered, is not a bridge within the contemplation of this act, which certainly relates only to bridges respecting which a reasonable question may arise as to "who ought to make them," and not to those, respecting which no question can ever arise whether they ought as a matter of public obligation to be made at all. If the meaning of the words "*public bridge*" could properly be derived from any other less authentic source than the statutable one I have mentioned, they might safely be defined to be such bridges as all his majesty's subjects had used freely and without interruption as of right, for a period of time competent to protect them and all who should thereafter use them from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned. And if a free and uninterrupted use of a bridge for near 90 years be not sufficient for the purpose of such protection, I am at a loss to say what length of time, or that any time, however long, could be effectual for the purpose. The circumstances of the removal, and application of the materials of the bridge to his majesty's use, cannot render it less a public bridge within the statute, if it had effectually become so prior to that period: and the only way in which that circumstance operates is in the way of evidence, and in order to establish that the bridge was in its origin and purpose a private one; a supposition which is in this case entirely repelled by the free and continued use of it on the part of the public from the moment of

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1810.

The King *against* The Inhabitants of Bucks.

its construction about the year 1706 to its downfall and destruction in 1796. It is unnecessary to pronounce what effect, if any, the several circumstances stated may have upon the legal existence of the ferry in question. Upon that subject we have at present no occasion to intimate an opinion. It is enough for us to say that neither the original existence and use of the ferry, nor its discontinuance afterwards, nor its renewal since, have the effect of either precluding or qualifying the operation of the statute of bridges in respect to the bridge now under consideration. Upon the whole, therefore, in conformity with the letter and spirit of the statute of bridges itself, and with all the cases which have in later times been decided upon this subject, and particularly with that of *Glasburne Beck Bridge*, (*Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 5 *Burr.* 2594.) and the principles there established, and since recognized in several subsequent cases, we are of opinion, that this bridge, situate in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, was and is a bridge repairable (as to the half part now in question) by the county of *Bucks*, in which it was until the period of its late dilapidation and destruction situate; and of course that the verdict found in this case against the defendants must stand.

Judgment for the Crown.

Monday, Feb. 12th.

TRUCKENBRODT *against* PAYNE.

To trefpafs and falfe imprifonment a plea of alien enemy not allowed to be pleaded together with a fpecial juftification inconfiftent therewith and the general iffue.

TO an action for an affault and falfe imprifonment the defendant pleaded, 1ft, not guilty; 2dly, that the plaintiff was an alien enemy; and 3dly, that the plaintiff having committed a felony, the defendant gave him in charge of a conftable to be taken before a magiftrate. *Abbott* thereupon obtained a rule calling on the defendant to fhew caufe why the rule before made for pleading feveral matters fhould not be difcharged, on the ground that the Court would not fuffer a plea of alien enemy to be pleaded with any other matter. *W. E. Taunton*, on fhewing caufe, faid he was not aware of any general practice of the Court not to fuffer alien enemy to be pleaded with other matters; though in *Shombeck* v. *De La Cour* (a), it had not been allowed to be coupled with a plea of tender to an action of affumpfit. But this was an action of a very different nature, and there was no reafon for preventing the defendant from availing himfelf of every legal defence againft it.

The Court however faid it was now the practice here as well as in C. B. not to fuffer the plea of alien enemy to be pleaded with other matter inconfiftent with it; and that the Court in feveral inftances of late had withdrawn permiffion to plead feveral mat-

(a) 10 East, 326.

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ters, unless the defendant agreed to strike out the plea of alien enemy: but on this occasion they gave *Taunton* leave to elect which of the special pleas he would abide by.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1810.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fiftieth Year of the Reign of GEORGE III.

EVAN WILLIAMS and DANIEL WILLIAMS *against* CATHERINE WILLIAMS, Widow.

By settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, *sans waste*, remainder to trustees to preserve contingent remainders, remainder to the use of the wife *for life, for her jointure*, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; *remainder to the heirs of the body of the husband and wife*, remainder to the right heirs of the husband; the wife survived the husband, and had no issue; and after possibility of issue by the husband extinct, held that she was tenant in tail after possibility, &c; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her.

THIS was a case sent by the Lord Chancellor for the opinion of this Court.

Daniel Williams, now deceased, was, prior to his marriage with *Catherine Williams*, then *Catherine Prosser*, seised in fee-simple of certain estates hereinafter mentioned; and by indentures of lease and release of the 7th and 8th of *Oct.* 1787, made between him of the first part, *J. Prosser* and *Catherine Williams*, (then *Prosser*,) daughter of the said *J. Prosser*, of the second part, and *T. Griffin* and *A. Barnes* (trustees) of the third part; after reciting

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1810.

WILLIAMS *against* WILLIAMS.

the intended marriage, it was witnessed that in consideration thereof, and of 1000*l.* paid by *John Prosser* to *Daniel Williams* for the marriage portion of *Catherine*, and for settling the lands, &c. after mentioned to the uses therein limited and declared, &c. *Daniel Williams* conveyed to the trustees and their heirs a messuage and other premises called *New Wonastow*, and other closes of land named in such settlement, containing together 130 acres; and also a tenement and lands belonging thereto, called *Worthy Brook Lands*, containing 75 acres, all in the parish of *Wonastow*, to hold to the trustees and their heirs to the use of *Daniel Williams* in fee until the marriage, and after that to his use for life, without impeachment of waste; remainder to the use of the trustees to preserve contingent remainders; remainder to the use of *Cath. Prosser* for life, *for her jointure*, and in bar of dower; and after the several deceases of *D. W.* and *C. P.*, remainder to the use of the first and other sons of the marriage in succession in tail male; remainder to the first and other daughters of the marriage in succession in tail male; and in default of such issue, *to the use of the heirs of the bodies of* Daniel Williams *and* Catherine Prosser; and in default of such issue, to the use of the right heirs of *Daniel Williams* for ever. The indenture also contained a power to *Daniel Williams* during his life, and after his decease to *Catherine Prosser* during her life, by indenture to demise and lease all or any part of the premises for any term of years not exceeding 21 years, to commence in possession, and not in reversion, or by way of future interest, *so as no such demises or leases, by any express words therein contained, should be made dispunishable of waste.*

The marriage between *Daniel Williams* and *Catherine Prosser* afterwards took place, but they never had any issue.

1810.

WILLIAMS *against* WILLIAMS.

issue. And *Daniel Williams* afterwards, by his will, properly executed and attested, dated the 5th of *Feb.* 1803, devised, from and after the decease of *Cath. Williams*, all his messuage, lands, &c. called *New Wonastow* and *Worthy Brook*, in the parish of *Wonastow*, and all other the settled lands, to his nephews *Evan Williams* and *Daniel Williams*, (the plaintiffs) as tenants in common in fee. The testator died in 1804, and left *Catherine* his widow, and his said two nephews, him surviving; one of whom, *Evan Williams*, is his heir at law. Upon the testator's death his widow entered into and hath since been in possession of the settled estates. There are a great many oak and ash timber trees growing on such settled estates so devised to the plaintiffs: and the defendant, *Catherine Williams*, having threatened to cut them down, in order to sell the same for her own use, the plaintiffs filed their bill in Chancery against her; praying for a perpetual injunction, to restrain her from cutting down any timber trees growing upon the settled estates. To which bill the defendant demurred, because the plaintiffs were not entitled to such relief: and it was insisted by her, that she took such estate and interest in the settled estates, by virtue of the said indentures of lease and release, as entitled her to cut the timber growing upon them for her own benefit. And upon the argument of such demurrer the Lord Chancellor ordered this case to be made for the opinion of the Court, upon the following questions:

First, Whether the defendant, *Catherine Williams*, were unimpeachable of waste upon the estate and premises comprised in the indentures of lease and release or settlement in the bill mentioned? Secondly, Whether, having cut timber thereon, she be entitled to the timber so cut,

1810.

WILLIAMS *against* WILLIAMS.

as her own property? And, thirdly, Whether the defendant's estate for life merged in the tenancy in tail after possibility of issue extinct?

Dampier argued for the plaintiffs in last *Michaelmas* term, and contended for the negative of the several questions proposed. If *Catherine Williams* were to be considered as tenant in tail after possibility of issue extinct, he admitted, upon the direct authorities of *Co. Lit.* 27. *b.* and 2 *Inst.* 302., that she was not impeachable of waste: though it did not follow that the timber cut would be her property. But, first, he denied that her estate for life merged in her remainder in tail after possibility (*a*). The two estates are said to be equal in quantity, and to differ only in quality; therefore there can be no merger; for that is only where a greater and a less estate come together in the same person. A life estate may be exchanged (*b*) with a tenancy in tail after possibility &c.; which shews their equality as to quantity; and it would be absurd that one estate equal in quantity to another should merge in that other; and by the third resolution in *Lewis Bowles's* case (*c*) the life estate does not merge in the estate tail after possibility &c. There indeed the tenant for life with remainder in tail after possibility, &c. was held entitled to the timber of the barn which was blown down; but there are these distinctions between the two cases, that there the husband and wife were before the birth of issue seised of *an estate tail in possession*, liable only to be devested by the birth of issue male and converted into estates for life without impeachment of waste, with remainder in tail: and after the birth and death of the issue male

(*a*) *Co. Lit.* 28. *a. Lewis Bowles's* case, 2d Resolution, 11 *Rep.* 80. *a.* & *b.*
(*b*) Ibid. (*c*) 11 *Rep.* 81.

1810.

WILLIAMS *against* WILLIAMS.

male, and the death of the husband, the wife was held not to be tenant in tail after possibility, &c. but to have the privilege of such a tenant *for the inheritance which was once in her*. Now here the widow is merely seised of an estate for life, with a remainder in tail after possibility, &c. in succession; and in the same deed power is given her to lease for 21 years on condition of making the lessee punishable for waste. [*Bayley* J. That power was necessary, otherwise the first son of the marriage coming into possession would not have been bound by the lease. Lord *Ellenborough* C. J. If she cut down trees, at whose suit could she be impeached for waste?] Supposing the person entitled to the intervening remainder in tail after possibility &c. were not the same person as the tenant for life in possession, such intervening remainder would not devest the right of the first tenant in remainder of the inheritance to the timber: then it seems to follow that if the estate for life be not merged, the same person having the two estates in succession would not affect the right of the owner of the inheritance. Another question arises, Whether these estates, having been settled upon the wife provisione viri, be not within the stat. 11 *H*. 7. *c*. 20. made against alienations by the wife of the lands of her deceased husband settled upon her for life or in tail. In *Cook* v. *Winford*, *Hil*. 1701 (*a*), a jointress, who was tenant in tail after possibility &c., was held to be within the statute, and therefore restrained from committing waste; the timber being part of the inheritance. That case, if accurately reported, is decisive; but search has been made, and no account of it is to be found in the Registrar's book; therefore some

(*a*) 1 *Eq. Cas. Abr*. 221. and ib 400 by the name of *Cook* v. *Whaley*.

 doubt

1810.

WILLIAMS *against* WILLIAMS.

doubt has been thrown upon it, otherwife the prefent queftion would not have been fent here. But even before the ftatute, fuch tenant in tail after poffibility could not have fuffered a recovery and aliened the inheritance: yet if fhe could cut and convert the timber to her own ufe, which is often of more value than the mere foil, part of the land might be taken and wafted, againft the manifeft intention of the ftatute. And as *timber* paffes by the word *land*, this cafe falls within the precife words of the ftatute: and there is no reafon for reftraining the words of it, as this cafe is equally within the mifchief meant to be guarded againft. The only difficulty is upon the remedy given by the ftatute, which is *by entry*, and which cannot apply to timber cut; and alfo upon the provifo at the end, that the widow may aliene for her life, which is equally inapplicable to the fame fubject-matter. But, by Lord *Coke* (*a*), the effect of the ftatute is to ftrip every tenant in tail provifione viri of the power of cutting timber, as a mode of alienating the inheritance. [*Bayley* J. Do you mean to contend that if the tenant in tail had had iffue, fhe could not have cut timber?] If fhe were a jointrefs provifione viri, fhe could not. [Lord *Ellenborough* C. J. It is one thing to fay that timber ftanding is land; but it is another queftion whether committing wafte by cutting it down can be faid to be an alienation of the land.] A jointrefs provifione viri could not fell the timber ftanding; but if fhe could cut it down and then fell it, fhe would be enabled to do that indirectly which the law does not allow to be done directly. But fuppofing the widow was not impeachable of wafte, ftill

(*a*) *Co. Lit.* 365. *b. Vide* the cafes upon the expofition of the ftatute collected there, and in p. 326. *b.*

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1810.

WILLIAMS *against* WILLIAMS.

ſhe has no property in the trees when cut down; for it is ſaid in *Herlakenden*'s caſe (*a*) that "if tenant in tail after poſſibility &c. fell the trees, the leſſor (*i. e.* there, the next in remainder of the inheritance) ſhall have them; for inaſmuch as he has but a particular intereſt for life in the land, he cannot have an abſolute intereſt in the trees; but he ſhall not be puniſhed in waſte, becauſe his original eſtate is not within the ſtatute of *Glouceſter*, *c.* 5. [*Le Blanc* J. That was not the point in judgment: and it is introduced with *It is ſaid*, &c.] In *Abrahal* v. *Bubb* (*b*), Lord Chancellor *Finch* took the ſame diſtinction, and reſtrained ſuch a tenant from doing waſte; and referred to *Endall* v. *Endall* (*c*) for the opinion of Lord C. J. *Rolle* to the ſame effect. And in *Whitfield* v. *Bewit* (*d*), Lord *Macclesfield* held that the property of timber cut down by tenant for life belonged to the firſt remainder-man in

(*a*) 4 *Rep.* 63. *a.* Sed vide *Pyne* v. *Dor*, 1 *Term Rep.* 55. and the caſes there cited.

(*b*) 2 *Show.* 69. and 2 *Freem.* 53.

(*c*) In the report of *Abraham* v. *Bubb*, in 2 *Freem.* 54. Lord C. J. *Rolle* is ſtated to have been of opinion in *Endall* v. *Endall*, that trover would lie for the reverſioner againſt tenant in tail after poſſibility &c. for trees cut down by him: but that caſe, which is to be found by the name of *Udall* v. *Udall*, in *Alleyn*, 81. and of *Uvedall* v. *Uvedall*, *M.* 24 *Car.* 2. in *B. R.* in 2 *Rol. Abr.* 119. was not the caſe of tenant in tail after poſſibility, but the caſe of *A*, tenant for life, remainder to his firſt and other ſons in tail, remainder to *B.* for life, and to his firſt and other ſons in tail: and *A.* having no iſſue, cut the timber. And it was held that *the poſſibility of the eſtate tail which might come to A.'s ſon*, if he had any, was no impediment to *B.*'s ſon *C.* (or, as *Alleyn* has it, another remainder-man in tail), who was then the firſt tenant in tail, maintaining trover againſt *A.* the tenant for life in poſſeſſion; the property of the trees when cut being in him who had the immediate inheritance of the land in him at the time when they were cut; though the intervening remainder for life to *B.* was an impediment to *C.*'s maintaining an action of waſte during *B.*'s life. *Note.* The tenants for life there were not made unimpeachable of waſte. And this is agreeable to the deciſion in *Whitfield* v. *Bewit*, 2 *P. Wms.* 240.

(*d*) 2 *P. Wms.* 240.

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1810.

WILLIAMS *against* WILLIAMS.

tail, though there were intervening eſtates for life. Now here the queſtion is, who had the firſt eſtate of inheritance? Not the tenant in tail after poſſibility; for ſuch an eſtate cannot merge an eſtate for life, but is in itſelf mergeable in an eſtate tail (*a*); but the plaintiff. The ſituation of the defendant is this; ſhe is tenant for life of an eſtate impeachable of waſte, with remainder to herſelf of an eſtate for life without impeachment of waſte; remainder to the plaintiffs in fee; the plaintiffs therefore having the firſt eſtate of inheritance in remainder are entitled to the timber when cut.

Benyon, contrà, in arguing for the affirmative of the queſtions propoſed by the Lord Chancellor for the opinion of this Court, ſaid, that though he could not, againſt the authorities, contend that in ſtrictneſs a tenancy for life could merge in a tenancy in tail after poſſibility &c.; the quantity of both eſtates being the ſame, though of different qualities; yet he inſiſted that the defendant was entitled to enjoy all the intereſts of the greater eſtate in poſſeſſion, notwithſtanding her prior eſtate for life; which was merged, if at all, not in the tenancy in tail after poſſibility &c. but in the immediate remainder in tail which ſhe once had before the eſtate after poſſibility &c. aroſe. For here, he obſerved, that upon the death of her huſband, ſhe became ſeiſed for life, with an immediate remainder in tail to her and her huſband, while there was a poſſibility of iſſue of the marriage; and therefore her remainder in tail was not ſeparated from her life eſtate by any intermediate eſtate of inheritance; as in *Lewis Bowles*'s caſe, where there was a veſted eſtate tail in *John*, the

(*a*) *Co. Lit.* 28. *a.*

iſſue,

issue, intervening between the life estate and the tenancy in tail in remainder; which vested estate tail continued in *John*, who lived until after the time when the tenancy in tail after possibility arose. But here the remainder in tail in the issue was always in contingency, there having been no issue born. Now during the period when the defendant, tenant for life, had such immediate remainder in tail, and before the tenancy in tail after possibility &c. arose, the merger of her life estate took place in such immediate tenancy in tail, without any intervening vested estate of inheritance; and not after the commencement of the tenancy in tail after possibility &c. In this view the third question is not so properly framed in the terms of it as it should have been. [*Bayley* J. asked if he had looked at the case of *Sutton* v. *Stone* in 2 *Atk.* 101., in the beginning of which he observed, that there must be some mistake in the report. (*a*)] But if the Court should consider that the defendant had only a bare tenancy for life, with a remainder in tail after possibility &c.; still, by reason of the latter and greater estate, to the benefits of which she was entitled in possession, she is not impeachable of waste, and has the property in the timber cut. *Lewis Bowles*'s case (*b*) was decided on the ground that the wife should, on account of the inheritance which was once in her, have the same privilege as a tenant in tail after possibility &c.; considering that the privilege of such an one plainly was not only to cut the timber but to have the property of it when cut: and there was no question, it was said, but that a woman might be tenant in tail after possibility &c. of a remainder, as well as of a possession.

(*a*) This part of the case is noticed in *Fearne*'s *Cont. Rem.* 81. 4th edit. as not being intelligible.

(*b*) 11 *Rep.* 81 *a*.

1810.

WILLIAMS *against* WILLIAMS.

session. As to the objection, that this interest, coming to the defendant *provisione viri*, is therefore unalienable by the stat. 11 *H.* 7., and that the cutting of timber by a jointress was held, in *Cook* v. *Winford* (*a*), to be within the prohibition of the statute; the distinction attempted to be taken in that case is an admission of the general right of tenant in tail after possibility &c. to cut and enjoy timber; but that distinction is not supported by any other authority, and much doubt has been thrown upon that case, which is not to be found in the Registrar's book, and has never been acted upon since. The case does not come within the words of the statute, which is against the alienation of *lands* coming to the wife provisione viri; and the application of it to *timber* is neither consistent with the remedy given by entry, nor to the proviso for the wife to alienate during her life. The reason too given in the case why a jointress tenant in tail after possibility &c. cannot cut timber, because she cannot alienate the land itself, would equally apply to a tenant for life *without impeachment of waste*, to whom the statute has never been contended to apply: and it is impossible to distinguish the two cases in principle: the one is not impeachable of waste by the act of the parties; the other by the act of law. *Abraham* v. *Bubb* was not the case of a tenant in tail after possibility &c. restrained from cutting trees at all, as might be supposed from the short note in 2 *Shower*, 69. but restrained from wasting ornamental trees, as it appears by the fuller report of the same case in 2 *Freeman*, 53. It is not improbable that the case of *Cook* v. *Winford*, which was in *Hil.* 1701, may have been of the same description; for shortly after, in

(*a*) 1 *Eq. Cas. Abr.* 221. 400.

Hil.

Hil. 1704, the Master of the Rolls decided (*a*) that a woman tenant in tail after possibility &c. had a right to cut timber in general; though he restrained her from cutting ornamental timber, because that seemed to be malicious. Then as to the property of the timber when cut, there can be no doubt that it belonged to the tenant in tail after possibility &c.: what was said to the contrary in *Henloken-den*'s case (*b*) was an obiter dictum, which was denied to be law in *Lewis Bowles*'s case (*c*): it was in fact thrown out at a time when the same doctrine was supposed to extend also to prohibit tenant for life, without impeachment of waste, from taking timber when cut. But it has been long settled that tenant for life, sans waste, has the property in the timber when prostrated; and this was recognized in *Pyne* v. *Dor* (*d*) in this court, and in the *Bishop of London* v. *Web* (*e*) in Chancery.

Dampier, in reply, said that a separate estate for life could never merge in a joint remainder in tail; for then the husband's estate for life would in his lifetime have merged in the joint remainder in tail. That this was not so strong a case for a merger, if there could have been any, as *Lewis Bowles*'s case; for there the husband and wife had a joint estate for lives, with a joint remainder in tail, after the intermediate estates tail limited to the first and other sons unborn: but even there, where the estates in possession and in remainder to the husband and wife were both joint, yet it was only held that the joint estate for lives merged *sub modo* in the joint remainder in tail, till issue was born, and then by operation of law the husband and wife became tenants for their lives, remainder, &c.

(*a*) 2 *Freem.* 278. *Anon.* (*b*) 4 *Rep.* 63. *a.* (*c*) 11 *Rep.* 83. *a.*
(*d*) 1 *Term Rep.* 55. (*e*) 1 *P. Wms.* 528.

Here,

1810.

WILLIAMS *against* WILLIAMS.

Here, then, after the death of the husband, and while there was still a possibility of issue of the marriage, *Catherine Williams* could only take a remainder in special tail sub modo, that is, till after possibility of issue extinct, (and the daughter of a daughter of the marriage could not have taken under that entail;) and after that, she took a general estate tail after possibility &c. in remainder after her life estate. And though she should be dispunishable of waste in respect of her estate tail after possibility &c.; yet having such estate ex provisione viri she is within the statute 11 *H.* 7. which will also extend to jointresses, tenants for lives without impeachment of waste, if the cutting of timber be a species of alienation within the statute, according to *Cook* v. *Winford:* and it must be taken that the legislature meant to restrain husbands from giving this power to their wives over the husband's estate, which, with respect to the timber, amounts to an absolute grant, inconsistent with the limited grant professed to be made. [*Le Blanc* J. The grant of an estate for life without impeachment of waste would take the case out of the statute.] This is claimed, not by the express grant of the husband, but as a privilege of law: tenant in tail after possibility takes not by the act of the party, but by the operation of law; and the law only favours such an estate more than a common estate for life, (which in other respects it resembles,) on account of the heritable nature of the estate which was once in her; but here the inheritable quality of the estate being gone, nothing but the bare privilege of being dispunishable for waste remained, and the property in the timber cut is gone.

It was intimated that gentlemen had taken notes for a second argument: but *The Court* said, that if upon con-

sideration

1810.

WILLIAMS *against* WILLIAMS.

ſideration they had any doubt upon the ſubject, they would direct the caſe to be argued again: and afterwards they ſent the following certificate:

This caſe has been argued before us by counſel; we have conſidered it, and are of opinion, firſt, That *Catherine Williams* is unimpeachable of waſte upon the eſtate and premiſes comprifed in the ſaid indentures of leaſe and releaſe or ſettlement in the bill mentioned. Secondly, That having cut timber thereon, ſhe is entitled to the timber ſo cut as her own property. And, thirdly, That the ſaid defendant became tenant in tail after poſſibility of iſſue extinct.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

DOE, on the Demiſe of CLARKE and Others, *againſt* GRANT.

Friday, May 11th.

In ejectment brought upon the joint demiſe of ſeveral truſtees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the truſtees, to ſhew that the truſtees were appointed at different times, as evidence that they were tenants in common; for as againſt their tenant, his payment of the entire rent to the common agent of all is, at all events, ſufficient to ſupport the joint demiſe, without making it neceſſary for them to ſhew their title more preciſely.

THIS was an ejectment brought to recover poſſeſſion of ſome land in the pariſh of *Linſlade* in the county of *Bucks*, which belonged to the truſtees of a certain charity, called *Wilkes's* Charity; and the firſt count, on which the plaintiff proceeded, was upon the joint demiſe of ſeven perſons who were the truſtees; whoſe title was proved by ſhewing the payment of rent by the defendant to their common clerk: but it appeared upon the croſs-examination of the clerk, who attended at

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1810.

Doe, Lessee of Clarke, against Grant.

the trial with the books belonging to the charity, that some of the seven had been appointed to the trust, and been in the receipt of the rent, together with others now dead, before the present clerk had come into office; and the rest of the seven had been appointed since, and at different times. Whereupon it was objected at the trial before *Grose* J. at *Aylesbury*, that these seven trustees coming to their title at different times, were tenants in common, and not joint-tenants, and therefore could not demise jointly: but the learned Judge over-ruled the objection, and suffered the plaintiff to recover; reserving leave to the defendant's counsel to move to enter a nonsuit, if the objection were well founded.

Peckwell Serjt. now moved accordingly, and renewed the objection. [*Bayley* J. The defendant paid one entire rent to the clerk for all the trustees, which was an admission that he held under all jointly.] Such payment only admitted their rights as they legally had them: and whether they were tenants in common or joint-tenants the clerk was accountable at law to each for his share; but it did not make them joint-tenants, when it appeared by the evidence that they were tenants in common. [*Bayley* J. The clerk must know whether he paid the rent into one common fund, as the case was, or whether he distributed it into seven different shares.] There was at least evidence sufficient of a tenancy in common to call upon the lessors of the plaintiff to shew their joint title in court.

Lord Ellenborough C. J. In favour of the lessors of the plaintiff, whose tenant, the defendant, held out against them, his act in paying the one entire rent to their

 clerk

clerk should enure in the most beneficial way for them, in support of their title as brought forward by themselves, unless the defendant had expressly proved them to be entitled in a different manner.

1810.

DOE, Lessee of CLARKE, against GRANT.

Per Curiam, Rule refused (*a*).

(*a*) Vide *Doe* v. *Read*, ante, 57.

RAWLINSON, BAGOT, and MULLION, *against* JANSON.

Friday, May 11th.

A licence to export goods to certain places within the influence of the enemy interdicted to *British* commerce, granted to *H. N.* on behalf of himself *and other* British *merchants*, &c. is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself.

THIS was an action on a policy of insurance on goods on board the ship *Daukberkeit*, from *Liverpool* to *Bremen*, in the river *Jalide*; and the place of destination being within the influence of the enemy, and interdicted to *British* commerce, it was necessary to have the king's licence, in order to legalize the voyage. Accordingly the plaintiffs, at the trial before Lord *Ellenborough* C. J. at *Guildhall*, put in a licence from the king, reciting that "whereas it had been represented to his majesty by *Henry Nodin*, on behalf of *himself and other* British *merchants*, that they were desirous of obtaining a licence to export a cargo of salt, colonial produce, &c. from *Liverpool* to the *Elbe*, *Weser*, or *Jalide*, on board the *Bremen* galliot *Daukberkeit*, *J. R.* master, &c. his majesty thereby granted licence to suffer such ship with the cargo to pass and be exported, to *whomsoever such goods might appear to belong*, and notwithstanding all the documents which accompanied such cargo might represent the same to be destined to any other neutral or hostile port: and that if the ship should be brought into port here, it should be liberated upon a claim being given in for the same *by or on behalf of the said* Henry Nodin,

1810.

RAWLINSON and Others *against* JANSON.

Nodin, and bail given, &c.; and that it ſhould be finally reſtored upon ſatisfactory proof being made that ſuch cargo was really *ſhipped by or under the directions of the ſaid* Henry Nodin, *or his agents*, for the purpoſe of being exported to ſome port on the river *Elbe*, *Weſer*, or *Jalide*." It appeared that *Henry Nodin*, on whoſe application this licence was obtained, after the goods were ſhipped, was only an agent for the perſons really intereſted in the cargo, who were *Britiſh* merchants at *Liverpool*. Lord *Ellenborough* C. J. held that this was ſufficient to protect the adventure under the licence, and the plaintiffs recovered.

The Attorney-General now took the opinion of the Court, upon a motion for a new trial, whether this were a ſufficient compliance with the terms of the licence. But all the Court were ſatisfied that it was ſufficient; and Lord *Ellenborough* C. J. ſaid that the object of inſerting the name of a particular perſon in theſe licences was to prevent their being obtained and handed about at large, by which means they might be made an improper uſe of. But he had no doubt that *Henry Nodin*, the perſon named, being proved to be the agent of the *Britiſh* merchants really intereſted in the adventure, ſufficiently identified the licence with it.

Rule refuſed.

OOM and Others *against* BRUCE.

Friday, May 11th.

An insurance having been made on goods, at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad, which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated; held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities.

THIS was an action on a policy of insurance, effected on the 20th of *November* 1807, on goods on board the ship *Elbe*, lost or not lost, at and from *St. Petersburgh* to *London*, including the risk of craft and lighters from *St. Petersburgh* to *Cronstadt* from shore to ship, &c.: and there was a count for money had and received. The insurance was made by the plaintiffs as agents of *John Platonoff*, a *Russian* subject abroad, in whom the interest was averred to be at the time of the insurance and of the loss. The ship, which was nineteen days in loading, was ready and sailed from the *Russian* port on the 17th of *Oct.* 1807; but was brought back on the same day and confiscated in *Russia*; hostilities having been commenced by that government against *Great Britain* on the day before; but which event was of course unknown at the time when the insurance was effected by the plaintiffs in *London*. It was admitted at the trial at *Guildhall*, that the *Russian* assured had obtained the restoration of his goods, upon payment of a certain sum; and the only question made was upon the return of premium, under the count for money had and received; the insurance having been made after the commencement of hostilities by *Russia*: but Lord *Ellenborough* C. J. considered that the plaintiffs, having effected the insurance without any consciousness of its illegality at the time, were entitled to recover back the premium, as money had and received by the defendant to their use, without consideration: and they obtained a verdict for the amount.

1810.

Oom and Others *against* Bruce.

Marryat now moved to ſet aſide the verdict, and, by leave, to enter a nonſuit; contending that the plaintiffs were not entitled to a return of premium. The inſurance was either legal or illegal: hoſtilities not having been declared by our own government at the time when the policy was effected, the contract was then legal on the part of the plaintiffs, as *Britiſh* ſubjects; and nothing which was done in *Ruſſia*, even if it had been known here, would have bound them, until the ſtate of war was known and recognized by this government. Then if the riſk attached for an inſtant, there can be no return of premium. On the other hand, if the inſurance were illegal from its inception, the authorities ſhew that the aſſured cannot recover back the premium.

Lord Ellenborough C. J. It is ſo, without doubt, if the party making the inſurance know it to be illegal at the time: but here the plaintiffs had no knowledge of the commencement of hoſtilities by *Ruſſia* when they effected this inſurance; and, therefore, no fault is imputable to them for entering into the contract; and there is no reaſon why they ſhould not recover back the premiums which they have paid for an inſurance from which, without any fault imputable to themſelves, they could never have derived any benefit. The commencement of hoſtilities by *Ruſſia* againſt this country placed the two countries in a ſtate of hoſtility, and made the ſubjects of *Ruſſia* enemies of this country at the time when the inſurance was effected here. Formal declarations of war only make the ſtate of war more notorious; but, though more convenient in that reſpect, are not neceſſary to conſtitute ſuch a ſtate. In *Furtado* v. *Rogers* (*a*), the inſurance was

(*a*) 3 *Boſ. & Pull.* 201.

effected

1810.

OOM and Others *against* BRUCE.

effected before the commencement of hostilities, and therefore the risk having once attached, there could be no return of premium; but here the risk never attached at all.

LE BLANC J. To entitle the underwriter to retain the premium, he should have shewn that the policy would have attached on any loss happening to the cargo on board the lighters in their way to the ship before the commencement of hostilities, though the contract were not made till after hostilities commenced: but the period to look to, as to the legality of the contract, is the time when it was made; and then the subjects of *Russia* had become enemies of this country, and it was no longer competent for the subjects of this country to enter into such a contract. But no blame attaches to the plaintiffs, who were ignorant of the fact at the time, and therefore they are entitled to a return of premium.

GROSE and BAYLEY, Justices, assented.

Rule refused.

MASON *against* PRITCHARD.

Friday, May 11th.

A guarantie by the defendant to the plaintiff "for any goods "he *hath* or "*may* supply "*W. P.* with "to the amount "of 100*l*." is a continuing or standing guarantie to that extent for goods which may at any time have been supplied to *W. P.* until the credit was recalled, although goods to more than 100*l*. had been before supplied and paid for.

THE defendant engaged in writing to guaranty the plaintiff "for any goods he *hath* or *may* supply my brother *W. P.* with, *to the amount of* 100*l*.," and declared in assumpsit as upon a contract by the defendant to guaranty goods to be at any time afterwards delivered to his brother to that amount. It appeared at the trial before *Wood* B. at *Worcester*, that at the time when the guarantie

 was

1810.

MASON *against* PRITCHARD.

was given goods had been ſupplied to *W. P.* to the amount of 66.*l.*, and another parcel was ſupplied afterwards, amounting together to 124*l.*, all which had been paid for; and the ſum now in diſpute was for a farther ſupply of goods to *W. P.* And the queſtion was, Whether this were a continuing contract for guarantying the ſupply of goods at any time afterwards furniſhed as long as the parties continued to deal together; or, whether it were confined to the firſt hundred pound's worth of goods furniſhed? The learned Judge held it to be a continuing contract to guaranty to the extent of 100*l.* goods which might at any time be furniſhed to the brother, till notice to put an end to it; and the plaintiff recovered accordingly; but leave was given to move to enter a nonſuit if the Court thought that this was not the true conſtruction of the contract. Upon which

Abbott now moved to enter a nonſuit; contending for the limited conſtruction of the guarantie.

But all *the Court* were of opinion with the plaintiff, that this was a continuing or ſtanding guarantie to the extent of 100*l.* which might at any time become due for goods ſupplied until the credit was recalled. The words, they ſaid, were to be taken as ſtrongly againſt the party giving the guarantie as the ſenſe of them would admit of; and the meaning was that the defendant would be anſwerable at all events for goods ſupplied to his brother to the extent of 100*l.* at any time, but that he would not be anſwerable for more than that ſum.

Rule refuſed.

1810.

HILL *against* YATES.

Friday, May 11th.

The fon of a juryman fummoned and returned, having anfwered to his father's name when called on the panel, and ferved as one of the jury on the trial of a caufe, is not of itfelf a fufficient ground for fetting afide the verdict, as for a miftrial.

THE plaintiff having obtained a verdict upon the trial of this caufe before *Le Blanc* J. at the laft affizes at *Lancafter*, *Littledale*, on behalf of the defendant, moved to fet afide the verdict and to have a new trial, on the ground of a miftrial; becaufe the fon of one of the jurymen returned upon the panel had anfwered to his father's name when called, and had ferved upon the jury; which fact was now verified by the affidavits of the fon, and of the defendant's attorney, and alfo of the fheriff's officer who fummoned the jury, and who fwore to having fummoned the father and not the fon. And he referred to the cafe of *Norman* v. *Beaumont*, of which a very full report is given in *Willes' Rep.* 484., and which is alfo reported in *Barnes*, 453., where, upon great deliberation, a verdict was fet afide for the fame caufe. He alfo mentioned a fubfequent cafe of *Wray* v. *Thorn*, *Willes*, 488., where a new trial was refufed, on an objection taken, that one of the jurors, whofe chriftian name was *Harry*, was named *Henry* in the venire, &c. and had anfwered to the latter name when called and fworn on the jury: but there, he obferved, the Court had diftinguifhed that from the former cafe, becaufe the juryman who ferved was the perfon really intended to be returned and fummoned.

The Court, however, confidering the extreme mifchief which might refult to the public from fetting afide a verdict upon a motion for a new trial on fuch a ground; inafmuch as the fame objection might happen to lie againft every verdict on the civil and criminal fides at the affizes; and recollecting that the fame objection had been

1810.

HILL *against* YATES.

taken and over-ruled ſince the caſe in *Willes*, though the name of the caſe did not then occur; refuſed to entertain the motion; but ſaid that if upon conſideration, and conſultation with the other Judges, they found themſelves bound to grant it, they would of their own accord award the rule prayed for.

And afterwards, on the 2d of *June*, towards the end of this term, Lord *Ellenborough* C. J., after adverting to the motion which had been made, and to the two caſes which were then mentioned, obſerved that in the latter of them, the Court appeared to have conſidered the application as a matter within their diſcretion; and no injuſtice having been done, they had refuſed to interfere. His Lordſhip then ſaid that he had mentioned this caſe to all the Judges, and they were all of opinion, that it was a matter within their diſcretion to grant or refuſe a new trial on ſuch a ground; and that if no injuſtice had been done, which was not pretended in this inſtance, they would not interfere in this mode, but leave the party to get rid of the verdict as he might. That if they were to liſten to ſuch an objection, they might ſet aſide half the verdicts given at every aſſizes, where the ſame thing might happen from accident and inadvertence, and poſſibly ſometimes from deſign, eſpecially in criminal caſes. His Lordſhip alſo now mentioned the caſe, which had been before alluded to by him on the former occaſion, where a juryman anſwered to another name in the panel, and was ſworn and ſerved by that wrong name, upon the trial of a priſoner for forgery, before Mr. Baron *Eyre* at *Newcaſtle* in 1783 (*a*): and though that was the caſe of

(*a*) A note of that caſe is here ſubjoined from my copy of the MS. book of Crown caſes, the original of which is in the cuſtody of the Lord Chief

1810.

HILL *against* YATES.

of a conviction for a capital offence, the Judges upon a reference to them would not interfere. There, however, the person who served was summoned upon the jury, but answered to a wrong name. His Lordship added that he had mentioned this matter again in Court, in order to put at rest the question once for all, that applications of this sort might not be made again and again.

Per Curiam, Rule refused.

Chief Justice of *K. B.* for the time being. See the Preface to my *Pleas of the Crown*, p. xiii. article 1.

The Case of a JURYMAN.

Where *R. C.* answered to the name of *J. C.* on the sheriff's panel, at the trial of a prisoner for a capital felony, it is mere matter of challenge, and after verdict cannot be taken advantage of by the party convicted as a mistrial.

AFTER the business on the Crown side at the Summer assizes for the county of the town of *Newcastle* was finished, it was discovered that *Robert Curry*, who served upon the jury, had answered to the name of *Joseph Curry* in the sheriff's panel, and had been sworn by that name. Upon further inquiry it appeared that there was a person of the name of *Joseph Curry* belonging to *Newcastle*, but not at that time resident within the town or county. That *Robert Curry* was qualified to serve on juries, and had been summoned by the bailiffs to attend on the crown side as a juryman at this assize. All this was mentioned to Mr. Baron *Eyre*, who conceiving it to amount to nothing more than a mere misnomer in the panel of the juryman intended to be returned, and who did serve, and that it was but cause of challenge, which, on being stated, would have been instantly removed by altering the panel; and that after judgment it could not be assigned as error; did not incline to interpose upon the ground of a supposed irregularity in the proceedings: but Mr. *Chambre* and Mr. *Villers* (counsel) having afterwards, in the Nisi Prius Court for the county of *Northumberland*, stated these facts to the Baron, and pressed them as amounting to a mistrial, the Baron thought fit to respite the execution of a convict for forgery, that he might have an opportunity of advising with the Judges upon this occurrence. On the first day of *Michaelmas* term 1783, the Judges were unanimously of opinion, that this was no ground of objection, even if a writ of error were brought; much less on a summary application.

1810.

Friday, May 11th.

HINDSLEY *against* RUSSELL, Executor of BARFF.

On plea of plene administravit, proof of an admission by the executor, *that the debt was just and should be paid as soon as he could*, is not evidence to charge him with assets.

The executor having pleaded non assumpsit as well as plene administravit, and plene administravit praeter, &c., and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non assumpsit, and being entitled to judgment of assets quando acciderint, is entitled to the general costs of the trial, though the issue of plene administravit was found for the defendant.

THIS was an action on a promissory note for 63*l*. given by the testator to the plaintiff; to which the defendant pleaded, 1. non assumpsit; 2. plene administravit; 3. plene administravit ultra what was due on bond and mortgage; on which latter the plaintiff took judgment of assets quando acciderint. And at the trial of the two first issues at *York* before *Lawrence* J. the hand-writing of the testator to the note being proved, the evidence, as to the plene administravit, was that the defendant admitted *that the debt was just and should be paid as soon as he could*. The learned Judge had great doubt whether this admission were evidence of assets on that plea; and therefore, though he suffered the plaintiff to take a verdict on both issues, he gave leave to the defendant's counsel to move the Court to set aside the verdict on the plea of plene administravit, and to enter it for the defendant on that issue.

Barrow moved the Court accordingly in the last term for a rule to shew cause why the verdict and judgment entered for the plaintiff on the plea of plene administravit should not be set aside, and a verdict and judgment entered thereon for the defendant: and he also produced an affidavit stating that *Russell* the executor had died since the trial, and there were no assets of the original testator to satisfy this debt. These facts were not denied now by *Lambe* on shewing cause in this term. And after hearing him shortly on the question of evidence,

The Court were satisfied that the admission proved was not evidence to charge the defendant with assets. They said

1810.

HINDSLEY *against* RUSSELL.

faid that his admiffion muft be taken with a reafonable intendment; for he could not mean to pledge himfelf to commit a devaftavit by paying this debt before others of a higher nature. But they held that the plaintiff was entitled to retain his verdict and judgment on the plea of non affumpfit.

In *Trinity* term following *Barrow* moved to have the poftea delivered to the defendant, to have his general cofts of the fame taxed; on the ground that as the plaintiff would have been obliged upon the plea of plene adminiftravit, on which the verdict was now entered for the defendant, to have proved the quantum of his demand, he was not put to any additional expence by the plea of non affumpfit having been pleaded. And he referred to *Garnans* v. *Hefketh*, *E.* 22 *G.* 3. and *Cockfon* v. *Drinkwater*, *T.* 23 *G.* 3. cited in 2 *Tidd* 883. laft edit. (vi. ib. 896, 7. 2d edit.)

But *The Court* (without hearing *Lambe*, who was to have fhewn caufe in the firft inftance) faid that the plaintiff, being at all events entitled to judgment of affets quando; and having been compelled by the defendant's pleading non affumpfit, to go down to trial; was entitled to retain the poftea, and to have the general cofts of the trial: and therefore they refufed the rule.

1810.

Saturday, May 12th.

De Metton and Another *against* De Mello.

The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*, which cargo being captured by a *British* cruiser, and libelled for condemnation in the Court of Admiralty as *French* and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent.

THE plaintiffs having been nonsuited (*a*) on the trial of this cause before Lord *Ellenborough* C. J. at *Guildhall*, *The Attorney-General* now moved to set aside the nonsuit; and stated that this was an action for money had and received brought to recover the proceeds of a cargo, which having been originally shipped at *Lisbon* for *Nantes* on board a *Portuguese* ship by the plaintiffs, a mercantile house settled at *Lisbon*, had been taken by a *British* cruizer, and libelled in the court of Admiralty for condemnation as enemy's property; when a claim of property having been put in by the defendant, a *Portuguese*, on his own account, the cargo was ordered to be restored to him; which was done accordingly, and he disposed of it in this country, and received the proceeds, for which this action was brought. It appeared now that the defendant was only a clerk to the plaintiffs, who carried on their house of trade at *Lisbon*, where they were domiciled, under his name, which was done to protect them from interruption during a period of great public troubles, and when, as it was said, a *Frenchman*, as *De Metton* was, (the other plaintiff being a *Swiss*) could not safely have traded at *Lisbon* except under the cover of a *Portuguese* house: and evidence was given at the trial, that the defendant had acknowledged by letter that the property of the cargo was exclusively in the plaintiffs, and that he had only lent his name to them for the purpose of neutraliz-

(*a*) 2 *Campb. N. P. Cas.* 420. S. C.

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ing the property. But Lord *Ellenborough* C. J. nonsuited the plaintiffs, on the ground that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant, after he had with their privity and direction put in a claim as owner before the court of Admiralty, which had been induced on that statement of facts to award restitution of the cargo to the defendant, as neutral property belonging to himself.

But in answer to this *The Attorney-General* now urged that though the property were *French*, yet the defendant's name had not been used by the plaintiffs for any collusive purpose as against this country, but for the purpose of protection in *Portugal*. That the plaintiffs were regularly domiciled there, and quoad this country were to be considered as *Portuguese* and neutral. That the trading from *Lisbon* to a port of *France* was lawful for them there, and contravened no law of this country. That as between the parties themselves the transaction was bonâ fide; and whatever the question might have been in the court of Admiralty, if the real state of the case had appeared to that Court, yet when the proceeds got into the defendant's hands by whatever means, he, who was only an agent of the plaintiffs, could not defend himself against their demand by alleging what had passed before another forum for a different purpose. [Lord *Ellenborough* C. J. Have not the plaintiffs colluded with the defendant by setting up a claim of property in him to withdraw from the jurisdiction of the court of Admiralty the decision of a question, which if the true fact had appeared, that this was the property of a *Frenchman*, might have led to a very different result? for it is certain that the cargo was destined to a *French* port.] If the property be taken to be *French*, the question is against the plaintiffs; but they are entitled to be considered for all trading purposes as *Portuguese*.

[Lord

1810.

De Metton *against* De Mello.

[Lord *Ellenborough* C. J. If that were ſo, by this ſort of contrivance the cargo would have the ſecurity of *Portugueſe* property to cover it here and in *Portugal*, and on the ſeas, and the ſecurity of *French* property to cover it in *France*. But the plaintiffs having defended the ſuit in the court of Admiralty here, by proving it to be *Portugueſe* and the defendant's property, ſhall they be permitted in another court of juſtice here to recover it from the defendant as *French* property and their own?] The proceedings which took place in the court of Admiralty, with the privity of the plaintiffs, only raiſed a ſtrong preſumption of fact againſt them, that the property was in the defendant, until they proved by his own admiſſion in writing that he only acted as agent for them.

Lord Ellenborough C. J. I think that the plaintiffs are eſtopped by their own act in ſetting up and eſtabliſhing in the court of Admiralty the claim of *De Mello* to this property, from now turning round and inſiſting upon it as their own. If they could have ſhewn that *De Mello* had acted tortiouſly as againſt them in ſetting up a falſe defence and claim to the cargo as his property in that court, that might have ſerved them; but on the contrary it appeared that he had acted all through with their privity and conſent. *De Mello* may have behaved like a rogue to the plaintiffs; but both plaintiffs and defendant have behaved wrongfully as againſt this country in colluding to make *French* property appear to be *Portugueſe* in the court of Admiralty upon a queſtion of prize as againſt the captors. The plaintiffs ſhould go back to the Admiralty, and have the matter ſet right there; that the opinion of that Court may be taken upon a true ſtatement of facts.

Per Curiam, Rule refuſed.

DOE, on the Demise of Sir MARK WOOD, *against* MORRIS.

Saturday, May 12th.

In ejectment, the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross examination, that an agreement *relative to the land in question* was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper: for though it might be *an agreement relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties.

SHEPHERD Serjt. moved to set aside a verdict which had been obtained at the trial of this ejectment in *Surry*, before the Lord Chief Baron, by the lessor of the plaintiff, who had lately before become the owner of the land by purchase, against the defendant, who had before and since the purchase occupied it as tenant. He stated that the landlord proved his case by shewing that the defendant had paid him rent, and that he had given the defendant half a year's notice to quit, which was expired before the ejectment was brought. But on the cross examination of the plaintiff's witness, he was asked whether there was not an agreement in writing relative to the holding of these lands; to which he answered that an agreement in writing relative to these lands was produced at the last trial of this ejectment, (this being the second trial) but he did not know the contents of it: and then another witness was called, who proved that he had seen the same paper in the hands of Sir *M. Wood*'s attorney on the same morning (i. e. of this trial.) Whereupon it was objected on the part of the defendant, that no parol evidence of the tenancy could be given, when it appeared that there was an agreement in writing concerning it; and it did not appear that the landlord had any right to determine the tenancy in the manner he had done. [Lord *Ellenborough* C. J. If there were any writing relative to this holding,

 in

1810.

Doe, Lessee of Sir Mark Wood, against Morris.

in the possession of the landlord, the defendant ought to have given him a regular notice to produce it; otherwise, in this collateral way, he would get the whole benefit of it, without giving such a notice, when if notice had been given and the paper were produced, it might not support the objection.] If the plaintiff's witness had not shewn that there existed such a paper before known to the landlord, I admit that the defendant could not have objected that there did exist a paper with such and such contents, without having given notice to produce it; but here it appeared that the landlord himself was in possession of the document relating to the tenancy, and therefore he could not be taken by surprize. The objection arose out of the plaintiff's own evidence.

Lord Ellenborough C. J. How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back. Enough at least ought to appear to shew that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time: it might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy: the witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question. We determined a case of *Doe, on the demise of Shearwood,* v. *Pearson,* similar to this in the last term,

 where

1810.

Doe, Lessee of Sir Mark Wood, against Morris.

where the rule for a new trial, which was moved on the same ground, was finally discharged (a).

The other Judges concurred, and the rule was refused.

Garrow, who was for the plaintiff at the trial, then said, that the fact was that the paper spoken of was drawn up between the defendant and the former owner of the estate, and that it had no relation to the matter in dispute between these parties.

(a) The short note which I took of this case, on the motion for the new trial by *Cockell* Serjt. in *Michaelmas* term last was this—The objection arose upon the notice to quit. The son of the lessor of the plaintiff proved that he had received rent of the defendant for his mother, and the time of these receipts agreed with the time for which the notice to quit was given: but he also spoke of the time for quitting from a written agreement entered into at the time of the taking between his mother and the defendant, which he said he had then lately seen in the possession of his mother: whereupon the objection arose that the agreement ought to have been produced; which was over-ruled at the trial at *York* before *Chambre* J. I have no note of the case when the rule was discharged.

LEATHES, Clerk, *against* LEVINSON.

Saturday, May 12th.

Though by the general rule a farmer may not at his pleasure tithe and carry *part* of a field of corn which has been cut, before the *whole* be tithed, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another time to take his tithe; which general rule, however, being levelled against fraud, vexation, and caprice, must, where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish. And, therefore, where a farmer cut the whole of a field of barley lying in the two parishes of *A.* and *B.*, and after rolling (*i. e.* cocking) and tithing part in *A.*, proceeded to roll and tithe part in *B.*; and the weather being catching, he carried that part which was tithed in *A.* the day before the rest of the field in *A.* was rolled and tithed; and this without previous notice of the intention to carry such part: held that this being done bonâ fide was lawful.

THIS was an action of debt on the stat. 2 & 3 *Ed.* 6. *c.* 13. for not setting out tithes; and the question made at the trial before *Grose* J., at the last assizes for the county

1810.

LEATHES *against* LEVISON.

county of *Norfolk*, was as to the regularity and legality of the manner in which the tithes had been set out. A verdict having passed for the plaintiff,

Frere Serjt. now moved to set it aside and for a new trial, and stated the case thus. The tithes in question arose out of a field of 24 acres in barley, 3-4ths of which was in the parish of *Reedham*, of which the plaintiff was rector, and the other 4th was in the adjoining parish of *Limpenhaw*. On a *Tuesday* in last *August* the whole crop of barley was cut down, and lay in the swarth; and in the evening of that day above half of that part of it which was in the plaintiff's parish was rolled and tithed in the customary manner ready for carrying. *Rolling* (*a*) is where the labourers go along the field and rake the barley transversely from the swarth into cocks or rolls, as far as the rake can reach; and this the Court have held to be a legal mode of tithing. Then the defendant, after rolling and tithing the better half of that which was in *Reedham*, left off, and proceeded to roll and tithe about an equal proportion of that which was in *Limpenhaw*, and did not resume the rolling and tithing of the remainder in *Reedham* till the *Thursday*; but on the intervening *Wednesday* about noon, he carried off his nine parts of that portion which was rolled and tithed in *Reedham*, before the remaining part of the swarth was rolled and tithed. Now the general rule is, that the whole of a field shall be tithed together before any part of it is removed (*b*). [Lord *Ellenborough* C. J. Do you mean to say that this must necessarily be done, notwithstanding one part of a field may

(*a*) Vide *Newman* v. *Morgan*, 10 *East*, 5. as to *tedding* in the process of hay-making.

(*b*) *Erskine* v. *Ruffle*, *M.* 10 *G.* 3. 3 *Gwil. Tithe Cas.* 961. but this rule is there stated with various exceptions and modifications.

be

be in a fit ſtate for cutting and carrying, and the other part not ripe? *Groſe* J. Or whatever the ſtate of the weather may be, which may require the corn to be ſaved as ſpeedily as it can be done?] The neceſſary exceptions of partial ripeneſs and catching weather muſt be always underſtood. [Ld. *Ellenborough* C. J. If the cutting and ſaving be done fairly, and in the ordinary courſe of huſbandry, and not fraudulently or capriciouſly, is there any deciſion which limits the farmer as to the mode of doing it?] In *Hall* v. *Machet* (*c*), it was held that though a farmer might cut down any part of a field at a time, as beſt ſuited his convenience, unleſs done with deſign to defraud or vex the parſon; yet that all the hay cut down at any one time muſt be tithed before any part of it could be carried away. [Lord *Ellenborough* C. J. Every perſon ſhall be taken to intend the neceſſary conſequence of his acts: and if the neceſſary conſequence of an act be vexation and injury to another perſon, to be ſure we cannot enter into the queſtion of the actor's intention.] It would neceſſarily be vexatious to the parſon, if the farmer could cut and tithe half a field, and then proceed to cut and tithe another field, or part of the ſame field in another pariſh: it neceſſarily compels the parſon to come twice to the ſame field: whereas if the farmer cannot carry any part of a field in the ſame pariſh till the whole be cut and tithed, that will inſure the parſon againſt unneceſſary labour, expence, and vexation, without ſubjecting him to the great difficulty in moſt caſes of proving a vexatious intention in the farmer. It did not appear that any neceſſity exiſted for cutting and tithing the field in the partial manner here practiſed; but the defendant did ſo for his own convenience; admitting that he had no

(*c*) 3 *Anſtr.* 915.

 vexatious

1800.
JAMES *against* [illegible]INSON.

vexatious intention againſt the parſon. [*Groſe* J. All the witneſſes agreed that the barley was tithed in the faireſt manner. The defendant left off rolling and tithing the reſt, and began to carry what was rolled and tithed becauſe it was doubtful weather.] If the defendant had had nobody's convenience to conſult but his own, I do not ſay that it could have been done in a more convenient manner. But the practice itſelf is prejudicial to the parſon, as liable to be abuſed; and there is no other way of trying the right but this. This caſe ſtands upon an alleged irregularity, without fraud, in the manner of tithing and carrying part of a field in the ſame pariſh before the remainder was tithed. At any rate, if the practice be legal, there ought to have been previous notice given to the parſon, that the farmer only meant to roll and tithe part of the field, ſo as to prevent him from coming for the remainder; according to *Franklyn* v. *Gooch* (*a*).

Lord ELLENBOROUGH C. J. I own I have no microſcope to enable me to ſee the particular inconveniences of which the plaintiff complains in this caſe. The whole of the field was cut down before any part of it was carried: the plaintiff does not pretend to complain of any grievance until the farmer began to carry a part on the *Wedneſday* at noon before the whole field was tithed: a reaſon was aſſigned for this becauſe the weather appeared doubtful; and no prejudice is ſtated to have accrued to the plaintiff from it: the rolling and tithing of the remainder was reſumed on the next day. The jury had the whole of the evidence ſubmitted to them, and they were ſatisfied that the tithing was done as fairly as the ſtate of the weather

(*a*) 3 *Anſtr.*

admitted.

admitted. Rules of mere regularity are after all only laid down to prevent fraud; but we are now called upon to decide on them with a rigour which belongs to no rule of any kind.

1810.

LEATHES *against* LEVINSON.

GROSE J. I told the jury that the tithing of the field was not to be done piece-meal unneceſſarily, but when began ſhould be continued fairly according to the ſtate of the weather: and they found that it was ſo done.

LE BLANC J. We do not interfere with the rule of law which requires that if a farmer begin to cut down and tithe a part of a field, he ſhall not ſtop at his pleaſure and go on to another field, and cut part of that, and ſo proceed to a third, &c.; ſo as to put the tithe owner to the trouble and expence of coming again to each field, to take part of his tithe of the field at one time and part at another. But I know of no rule of law which obliges a farmer when he has begun cutting a field to ſtop in it when he comes to the boundary line of the pariſh, and finiſh tithing all which lies in one pariſh before he proceeds with the reſt of the field. But that is in truth what is complained of in this caſe.

BAYLEY J. according.

Rule refuſed.

1810.

Saturday, May 12th.

GROSVENOR, Executor of ELLIS, *against* The Inhabitants of the LATH of ST. AUGUSTINE, in the County of KENT.

An action of debt for 100*l.* lies upon the stat. 19 G. 2. c. 34. s. 6. against the inhabitants of a lath in Kent by the executor of a revenue officer, who, being in a boat between high and low water mark in pursuit of a smuggling boat in which were offenders against the act, received a mortal wound by a shot fired [illegible] in the lath, though the officer afterwards died on the high sea beyond the low water mark, and, consequently, *out of the lath*; and the act gives the remedy against the inhabitants of the lath, &c. where the fact shall be committed, i. e. where the officer endeavouring to apprehend the offenders shall be *killed*.

Qu. The application of the stat. 8 Geo. 2. c. 16. as to the *mode of levying* the money recovered, which by that act is directed to be by two justices of the peace of the *county, riding, or division*, where the fact happened within the jurisdiction of the Cinque Ports, which has an exclusive commission of the peace.

THIS was an action of debt for 100*l.*, upon the stat. 19 *Geo.* 2. *c.* 34. *s.* 6. (*a*), which enacts that if any officer of the revenue, or other person employed in seizing uncustomed goods, &c. or in endeavouring to apprehend any offender against that act shall be *killed* by any offender against that act, &c. the inhabitants of every rape or lath in counties so divided, and in every other county in *England* the inhabitants of every hundred *where such fact shall be committed* shall pay 100*l.* to the executor or administrator of the person so killed; to be recovered by action against such inhabitants. And that if the plaintiff in such action recover, all the inhabitants of the lath, &c. shall be rateably and proportionably assessed towards the payment of the damages and costs, and also of the expences of defending the action, to be levied by the ways and means, and in the manner and form prescribed by the stat. 8 *Geo.* 2. *c.* 16. relative to actions on the statute of hue and cry. The fact in this case was that the testator, a revenue officer, being in a cutter in pursuit of a smuggling boat in which were offenders against the act, received a shot while in the cutter between high and low

(*a*) This, which was a temporary act, has been continued by different acts, of which the 26 *Geo.* 3. *c.* 80. the last I have any account of, carries it down to the end of the next session of parliament after 1788.

water

water mark, which shot was fired by an accomplice of the smugglers from the shore, within the lath of *St. Augustin*, and the jurisdiction of the Cinque Ports, and lingering for a short time was carried out in the pursuit beyond low water mark, and died in the cutter upon the high sea. And the plaintiff having recovered at the trial in *Kent*, before the Lord Chief Baron,

1810.

GROSVENOR *against* The Inhabitants of the Lath of ST. AUGUSTINE, KENT.

Marryat now moved, by leave of the learned Judge, to set aside the verdict, and enter a nonsuit if this Court were of opinion that the objections taken at the trial, and then over-ruled, were well founded. These were 1st, that the party having died at sea, out of the jurisdiction of the county, the fact of his being *killed* could not be said to have happened *within the lath* of *St. Augustin*, whose inhabitants were sued; and that the jury of the county had no jurisdiction to try the action for the penalty. That by *s.* 5. of the act, special provision was made for the trial of any indictment or information for any offence made felony by that or other acts relating to the revenues of customs or excise, in any county in *England*; but no similar provision was made in respect to this action. 2dly, That the place from whence the shot was fired, and where the mortal wound was received, was within the jurisdiction of the Cinque Ports, which has an exclusive commission of the peace, and within which the Justices of the county at large cannot interfere. Then, as the money to be recovered by action against the inhabitants of the lath is to be "*levied* by the ways and means "and in the manner and form prescribed by the statute 8 *G.* 2. *c.* 16.;" and as by that act (*s.* 4.) the sheriff charged with the writ of execution, "instead of serving the same on any inhabitants (i. e. of the hundred) shall

1810.

GROSVENOR *against* The Inhabitants of the Lath of ST. AUGUSTINE, KENT.

cause the same to be produced to two justic[illegible]f the peace *of the county, riding, or division,"* who are to cause the taxation to be made and levied in the manner prescribed by stat. 27 *Eliz. c.* 13.; there does not seem to be any mode by which the money recovered in this action can be levied, and therefore it is casus omissus, and not within the remedy given by the act. He said that, after making inquiry, he could not find that any similar action had been before brought upon this statute: but *Grose* J. said he remembered an instance of such an action brought many years ago, which was tried in the county of *Cornwall.*

Lord ELLENBOROUGH C. J. The shot which produced the death having been fired from the shore within the lath brings the case within the fair meaning of the act, the object of which was to make the inhabitants of that place where the act was done which caused the death answerable for it, in order to interest them in repressing the offences against which the act was levelled. Then the inhabitants of the lath are mentioned nominatim as being liable to pay the money to be recovered by action; and whatever difficulty there may be in applying the directions of the 8 *G.* 2. as to the levying of the money to this case, we will leave that difficulty to be settled when it judicially arises. It is sufficient at present to say that there is no ground for setting aside the verdict which has been obtained.

Per Curiam. Rule refused.

1810.

HENKIN *against* GUERSS.

Saturday, May 12th.

The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest.

AN action of assumpsit upon a wager of 300*l.* upon the practice of the Court, whether a person could be lawfully held to bail on a special original for a debt under 40*l.* was entered for trial at the last sittings at *Guildhall* before Lord *Ellenborough* C. J., who, on hearing the nature of the cause, reprehended the indecorum of the attempt to obtain in this manner the opinion of the Court upon a question of law or judicial practice, in which the parties had no apparent interest other than what the wager itself created: and his Lordship therefore refused to try the cause; telling the plaintiff's counsel that he might apply to this Court upon the subject if his client felt himself aggrieved by such refusal.

Park now submitted to the Court that there was no legal objection to the trial of the cause. When Lord *Loughborough* formerly refused to try a cause of *Brown* v. *Leeson* (*a*), on a wager respecting the number of chances of throwing 7 and 11 on two dice, the Court approved of such refusal, not on the ground that the parties had no particular interest in the wager, but because it respected the mode of playing an illegal game with dice, and was therefore of an immoral tendency. He said he was unwilling to make any specific motion that the cause should be tried at the next sittings in *London*, as that would follow of course if the Court thought it a fit cause to be tried.

(*a*) 2 *H. Blac.* 43.

1810.

HENKIN *against* GURNEY.

But the rest of the Court now concurred with the Lord Chief Justice in the propriety of his refusal to try a cause of this description. And his Lordship added, that courts of justice were constituted for the purpose of deciding really existing questions of right between parties: and were not bound to answer whatever impertinent questions persons thought proper to ask them in the form of an action on a wager. That though there was nothing immoral in the subject of this wager, yet he considered it as an extremely impudent attempt to compel the Court to give an opinion upon an abstract question of law not arising out of pre-existing circumstances in which the parties had an interest. *The Court*, however, refused to grant, on the application of *Garrow*, the defendant's counsel, a rule for judgment as in case of a nonsuit, there having been no default of the plaintiff in not proceeding to trial. And *Le Blanc* J. said, that if by any other proceeding in court it appeared that in truth no such wager had really been made, the Court would know how to deal with the case (*a*).

(*a*) 2 *Campb. Ni. Pri. Caf.* 408. S. C.

Saturday, May 12th.

FINLEY *against* JOWLE.

The stat. 20 *G.* 2. *c.* 19. *f.* 4. enabling two magistrates, "upon "application or "complaint "made upon "oath by any "master against "such apprentice" as is described in the act, touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master and verified by the oath of another person.

THE stat 20 *Geo.* 2. *c.* 19., for the regulation of certain servants and apprentices, enacts (*f.* 4.) that it shall be lawful for two or more justices of the peace "*upon application or complaint made, upon oath, by any master or mistress*, against any such apprentice, touching any misdemeanor, &c. in such service," to hear and determine the same,

same, and punish the offender by commitment to the house of correction, there to be corrected and held to hard labour not exceeding one calendar month; or otherwise to discharge such apprentice. The plaintiff was an apprentice within the description of the act, against whom his master, the defendant, had preferred a complaint in writing before two magistrates of the county of *York*; which complaint was verified by the oath of a witness who spoke to the fact, but not by the oath of the master himself: and the magistrates having discharged the defendant of his apprentice, the latter brought this action upon the indentures against his master, who justified under the magistrates' discharge: and upon the special matter appearing at the trial, it was objected that the magistrates had no jurisdiction by the words of the act, the complaint not having been verified upon the oath of the master. But *Thomson* B. before whom the cause was tried at *York*, over-ruled the objection, and a verdict passed for the defendant.

Cockell Serjt. now renewed the objection, upon a motion for a new trial, and drew the attention of the Court to the particular wording of the clause.

Lord ELLENBOROUGH C. J. The words of the act must be understood with reference to the subject matter. The application or complaint must be made to the magistrates *by the master or mistress*, because they alone have an interest in preferring it: and it must be verified *upon oath*, but it need not be upon the oath of the master or mistress, who may know nothing of the fact themselves: the complaint may be well founded upon some cause which happened in their absence. But it is sufficient that

1810.

FINLEY *against* JOWLE.

that the master makes the complaint and verifies it by the oath of the person who knows the fact; otherwise unless the fault were committed in the presence of the master, he would be without the remedy intended to be given by the legislature.

Per Curiam. Rule refused.

Tuesday, May 15th.

BETTISON and Another *against* Sir ROBERT HOWE BROMLEY, Bart.

The wife of an acting executor taking no beneficial interest under the will is a competent attesting witness to prove the execution of it, within the description of a *credible witness* in the statute of frauds 29 *Car.* 2. *c.* 3. *s.* 5.

THIS was an issue directed by the Master of the Rolls, to try whether a paper writing dated 28th *April* 1807, and purporting to be the will of the late Sir *Geo. Pauncefote*, Bart., was executed by Sir *George* in the manner required by law to pass real estate. The plaintiffs maintained the affirmative, and the defendant the negative: and at the trial before Lord *Ellenborough* C J. at *Westminster*, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of the Court on this case.

The testator was of sound mind; the will was attested by three witnesses, and the execution of it in every respect regular, supposing the witnesses were competent: but an objection was made to the competency of *Susan Smith*, one of the attesting witnesses, on the ground that she was the wife of *Jeremiah Smith*, whom the testator had named one of his executors in the will, and who, with the other executors, had proved the will and acted. *Jeremiah Smith* was not a creditor of the testator, either at the time of the execution of the will or of the testator's decease; and he had no interest but what (if any) appeared

1810.

BETTISON against BROMLEY.

appeared on the face of the will. A copy of the will accompanied the will; but *Jeremiah Smith* appeared to take no beneficial intereſt under it. The queſtion reſerved was whether *Suſan Smith* were a competent witneſs to prove the execution of the will? If ſhe were, the verdict was to ſtand: if not, a verdict was to be entered for the defendant.

Dampier, for the plaintiffs, maintained the competency of the witneſs, whoſe huſband took no intereſt, either by way of legacy or reſiduum, under the will. All that he took as executor was a burthenſome office, which could not make him a leſs credible witneſs in ſupport of the will. He cited 1 *Mod.* 107. *Anon.*, where, on a trial at bar, Ld. C. J. *Hale* ſaid that an executor might be a witneſs in a cauſe concerning the eſtate, if he had no intereſt in the ſurpluſage; and that he had known it ſo adjudged. *Lowe* v. *Jolliffe* (*a*), in which an executor in truſt (*b*) who had acted under the will was permitted to prove the teſtator's ſanity. And Lord *Mansfield* there referred to *Holt* v. *Tyrrell* (*c*), in 1727, where on a trial at bar a truſtee was held to be a witneſs without releaſing. So in *Goſs* v. *Tracey* (*d*), it was declared that a grantee, being only a bare truſtee, was a good witneſs to prove the execution of the deed to himſelf. Laſtly, in *Goodtitle* v. *Welford* (*e*), an executor who had acted, who was alſo deviſee of a reverſionary intereſt in copyhold under the will, having ſurrendered that intereſt to the uſe of the heir, who, however, had refuſed to accept the ſurrender,

(*a*) 1 *Blac. Rep.* 365.

(*b*) He had alſo a legacy under the will, but this he had releaſed, in order to be a witneſs.

(*c*) 1 *Barnard. Rep. K. B.* 12. S. C. (*d*) 1 *P. Wms.* 290.

(*e*) *Dougl* 139.

was

1810.

BETTISON *against* BROMLEY.

was held a competent witness to prove the testator's sanity, being considered as an executor taking no beneficial interest: and though in *Hudson* v. *Kersey* (*a*), Ld. *Camden*, when Chief Justice of *C. B.*, differed from the rest of the Court, and from the doctrine of Ld. *Mansfield* in *Wyndham* v. *Chetwynd* (*b*), as to the construction of the word *credible* in the stat. of frauds (*c*), requiring the attestation of three credible witnesses to a will of lands; yet that does not affect this case where the executor took no beneficial interest. Neither can this case be affected by the stat. 25 *Geo.* 2. *c.* 6., even supposing the appointment of an executor could be considered as an appointment within that statute, which it seems not to be. [Lord *Ellenborough* C. J. An executor could not be a witness if he were suing or sued as a party in a cause, because he would be interested in the costs (*d*).] The decree in Chancery would not be evidence to affect any question on the proof of the will in the Commons.

Littledale contrà said, that the only interest in the witness that he could suggest was, that if a suit were instituted in the Commons by Sir *Robert Bromley* against the executors to make probate of the will, the decree in this case would be evidence against him. But

Le Blanc J. said, that the only question here was whether this were a good will of land; and whatever the decision might be, it would not affect any question concerning the probate in the Commons.

(*a*) E. 5 G. 3. in C. B. 4 *Burn's Eccl. L.* 86. 4th edit.
(*b*) 1 *Burr.* 414. 1 *Blac. R.* 95. (*c*) 29 *Car.* 2. *c.* 3. *s.* 5.
(*d*) Vide *Man* v. *Ward*, 2 *Atk.* 229.

And

1810.

BETTISON against BROMLEY.

And all the Court agreed upon the principal point, that the will was well proved in this caſe. Lord *Ellenborough* C. J. ſaid that the point had been decided ſo long ago as Lord *Hale's* time, that an executor, having no intereſt in the ſurplus, was a good witneſs to prove the will in a cauſe concerning the eſtate: and this had been followed by other deciſions to the ſame effect. Here the executor took no intereſt under the will, but only a burthenſome office. The other Judges concurring,

Poſtea to the Plaintiffs.

TENNY, on the Demiſe of SETH AGAR, *againſt* BENJAMIN PRESTON AGAR and Another.

Tueſday, May 15th.

Under a deviſe of lands to the teſtator's ſon and his heirs for ever, as to part of the lands, upon condition that he ſhould pay to the teſtator's daughter 12*l.* a-year till ſhe came of age, and then pay her 300*l.*; and in default of payment, that ſhe ſhould enter upon and enjoy the ſaid part to her and her heirs for ever: and in caſe his ſon and daughter both died without leaving any child or *iſſue*, he deviſed the reverſion and inheritance of *all* the lands to another: held that the deviſe over was not an executory deviſe, but a remainder limited after ſucceſſive eſtates tail of the ſon and alſo of the daughter by implication; the intent being apparent that the deviſe over ſhould not take effect till after failure of the iſſue of the ſon and daughter, and that it ſhould then take effect; and this being the only conſtruction which would give effect to ſuch intent conſiſtently with the whole of the will taken together.

IN ejectment for lands in the county of *York* a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the following caſe.

John Agar, being ſeiſed in fee of the premiſes in queſtion, in 1737 deviſed to his only ſon *John Agar*, and his right heirs for ever, a certain houſe, buildings, lands, &c. in the lordſhip of *Holtby*, and alſo 9 other cloſes in the poſſeſſion of a certain tenant in the ſame lordſhip: and then the will proceeded, "which laſt-mentioned 9 cloſes I hereby give to the ſaid *John Agar* and *his heirs* for ever upon this condition only, that he ſhall yearly, by half-yearly payments at *Michaelmas* and *Lady-day*, pay to my daughter *Elizabeth Agar*, his only ſiſter, the full and juſt

 ſum

1810.

TENNY, Lessee of AGAR, *against* AGAR.

sum of 12*l.* a year, limited to her, until she shall attain the age of 21 years, and after that age to pay her 300*l.* in lieu thereof, and in full of her portion: and for default of payment of any part so limited and bequeathed to her, she shall enter into the said 9 closes, or any part thereof in the name of the whole, and shall enjoy them all *to her and her heirs for ever* in case of non-payment or non-performance as afore limited, but not otherwise. And *in case my said son and daughter both happen to die without having any child or issue,* lawfully begotten or to be begotten, then and in such case only I give and devise *the reversion and inheritance* of all my said buildings, lands, and hereditaments whatever in *Holtby* aforesaid, to my cousin *Richard Agar* and to his right heirs for ever." And the testator made his son and daughter joint executor and executrix. The testator died in 1737, leaving his son and daughter, and *Richard Agar* him surviving. And thereupon *John Agar* the son entered upon and enjoyed the premises until his death in 1807, having duly performed the conditions in the will contained. In *Trinity* 18 *Geo.*3. *John Agar* duly suffered a recovery of all the premises, in which he and his sister *Elizabeth* were the vouchees; and declared the uses thereof to himself in fee: and afterwards, by his will duly executed, devised the same to the defendants in fee, who are now in possession thereof. *Elizabeth Agar* died in the lifetime of her brother; and neither of them had any issue. *Seth Agar* is the heir at law of *Richard Agar* the devisee in fee named in the will of *John Agar* the father; which *Richard Agar* was the heir at law of *John Agar* the father next after his said son and daughter. The question reserved was, Whether *Seth Agar* were entitled to recover? If he were, the verdict was to stand; if not, a verdict was to be entered for the defendants:

defendants: and the real question was, Whether the devise over to *Richard Agar* were an executory devise, after an estate in fee to *John Agar*, and consequently not barrable by the recovery: or whether such devise over being limited to take effect in case the son and daughter died without leaving *issue*, operated as a restriction upon the prior limitations to the son and daughter and their *heirs* respectively, so as to give to *John Agar* an estate tail only, and to raise by implication an estate tail in *Elizabeth*; in which case the recovery would bar the devise over.

Holroyd, for the plaintiff, contended that the first express devise to the son in fee, and also the devise of the nine closes to him in fee on condition, and on his non-performance of that condition, the devise over to the daughter in fee (*a*), were not restrained to estates tail by the subsequent devise over being "in case the son and daughter died *without having any child or issue*," but that such subsequent devise over to *Richard Agar* was an executory devise, and not too remote; and therefore not barrable by the recovery suffered by the son and daughter. The limitation over to *R. A.* is not simply upon the death of *John*, the son, *without leaving issue*, but also in default of *Elizabeth* leaving issue, to whom no estate was before given except upon the breach of condition by her brother *John*; and therefore no estate tail can be raised in her by implication (*b*); neither can it operate to cut down to an estate tail the prior devise to the son in fee; for the devise over is upon an event which does not affect the estate given to him, namely upon the death of the daughter as well as the son without leaving issue; and there-

(*a*) [illegible] is a good limitation over. *Hainsworth* v. *Pretty*, *Cro. Eliz.* 919.
(*b*) *Gardner* v. *Sheldon*, *Vaugh.* 279. 1 *Eq. Cas. Abr.* 197.

fore

1810.

TENNY, Lessee of AGAR, against AGAR.

fore the devisee of the son would take during the continuance of issue of the daughter. It is clear that the testator first meant to give the son a fee: and the fee being given by express words to one who was heir at law, the intent to disinherit him either in whole or in part ought, as is said in *Wild's* case (a), and in *Goodright* v. *Goodridge* (b), to be clear and manifest; otherwise the Court will not restrain the legal and proper meaning of the words. And here there is no necessary intendment, as there was in the latter of those cases, where the devise over to the younger son was if the eldest died without *heirs*; who could not die without *heirs* while his younger brother or any of his descendants were living; and therefore the testator must have meant heirs *of the body*. The death of the son and daughter, without leaving issue, only marks the time, as was said in *Gardner* v. *Sheldon*, when the land should come to the devisee over. In some cases (c) where the devise over has been to the heir at law after the death of another, such as the testator's wife, that has been held to give an estate for life by implication to the person on whose death only the heir was to take: but that rule would not apply to the devisee over in this case, who would only have been heir at law after the death of the son and daughter and their descendants, and therefore for this purpose is no more than a stranger: and it is clear that no such implication can arise where the devise over is to a stranger after the death of another without issue (d). The devise over must be either an executory devise as to *all* or to *none* of the prior estates given: and if not an executory devise, it must be a re-

(a) 6 *Rep.* 16 *b*. (b) *Willes*, 374.

(c) Vide 13 *H.* 7. 17. *pl.* 22. and *Willes*, 373.

(d) He referred to 6 *Cruise's Dig* tit. *Devise*, 181. as collecting the cases on this subject.

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1810.

TENNY, Lessee of AGAR, against AGAR.

mainder after an estate tail; but as burthens were imposed upon the son in respect of part of the property devised to him, if he were only to take an estate tail, he might be a loser. An annuity is to be paid to the sister till she comes of age, and then a gross sum. [Lord *Ellenborough* C. J. The 12*l.* to be paid to her annually is nothing more than interest at 4*l.* per cent. for the principal sum of 300*l.* to be paid to her when she comes of age. *Bayley* J. If she got the estate itself, she would have that out of which the payment was to be made.] To give the sister an estate tail by implication would be to give her the property in one event, when the testator has declared that she should only have it in another event. The devise over being upon the event of the son and daughter dying without leaving issue; in order to give effect to these words, it is not necessary to imply an estate tail in the son; for coupling them with the estate in fee before expressly devised to him, he would still take a fee determinable on the contingency of himself and his sister dying without leaving issue; the remainder over therefore would be a contingent remainder, and as such would be destroyed by the recovery. The devise over is of the *reversion* immediately upon the happening of the event, which word reversion was held in *Bailis* v. *Gale* (*a*) to pass the whole estate: but if the son and daughter took estates tail it would only pass a future interest liable to be defeated at any time by the act of the tenants in tail. The devise over is after a dying without *leaving issue*; and there has been no case deciding that those words, even as applied to *freehold* estate, extend to an indefinite failure of issue: especially where such a construction, by

(*a*) 2 *Vef.* 48. 51.

1810.

TE LESS Ac against AGAR.

giving an eftate tail to the firft taker, would enable him immediately to defeat the devifes over, contrary to the intent of the teftator. In *Forth* v. *Chapman* (*a*), a dying without leaving iffue was held to be confined in the cafe of a term to the time of the death: and though a diftinction was there taken between the devife of a term and of a freehold; and in *Walter* v. *Drew* (*b*) a devife, that if *William* the teftator's eldeft fon die "and *leave* no iffue of his body," then the lands of inheritance fhould go to the younger fon, was held to give an eftate tail by neceffary implication to *William*, who was heir at law; yet that went upon the ground that the teftator's intent would otherwife be defeated: and in *Porter* v. *Bradley* (*c*), Lord *Kenyon*, upon a review of all the authorities, thought there was no ground for making a diftinction between the devife of freehold and chattel interefts, and that thofe words fhould be conftrued to mean a dying without leaving iffue at the time of the death; though in that cafe he alfo relied upon the additional words "leaving no iffue *behind him*." It does not appear, however, how the words "*behind him*" can carry the fenfe of the word *leaving* farther; as the word *leave* applied to the fubject matter neceffarily means *leave behind*, or *leave furviving*; for if the iffue do not furvive, the party dying cannot be faid to *leave* iffue; at leaft in cafes where a different conftruction is not neceffary to give effect to the manifeft intention of the teftator, as in *Walter* v. *Drew*. And this has fince been acted upon in *Roe* v. *Jeffery* (*d*); and Lord C. J. *Wilmot*'s reafoning in delivering the opinion of the Judges to the

(*a*) 1 *P Wms*. 663. (*b*) *Com. Rep.* 372.

(*c*) 3 *Term Rep.* 143; but fee *Daintry* v. *Daintry*, 6 *Term Rep.* 314. and what was faid by *Lawrence* J. in *Doe* v. *Cooke*, 7 *Eaft*, 271.

(*d*) 7 *Term Rep* 589.

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1810.

TINNY, Lessee of AGAR, against AGAR.

House of Lords in *Keilly* v. *Fowler* (a), strongly supports the same conclusion upon the effect of the word *leaving*. And here it will best effectuate the whole intent of the will to confine the words to a dying without leaving issue at the time of the death.

Richardson, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. We have heard a laborious and ingenious argument, which has endeavoured to cloud an intention as distinctly and plainly expressed as a testator could have done, and which, if not expressed in terms, is plainly to be inferred from the whole of the will. Nothing can be clearer than that *Richard Agar* was not intended to take any thing until the issue of the testator's son and of his daughter were all extinct: and then the question is, whether upon the words of the will an estate tail can be raised in them. The words first used would certainly carry a fee, "to *John Agar* and *his heirs for ever*," &c. unless by the subsequent words it appears that he meant to give them a less estate: but it is not necessary to cite cases, such as *Porter* v. *Bradley*, to shew that such words may receive a narrower construction, if by subsequent words it manifestly appear that the testator so intended. Here then the testator proceeds to annex a condition to the devise of the nine closes to his son, that he should pay to his daughter till she came of age 12*l.* a-year; which is at the rate of 4 per cent. upon the 300*l.* which he was to pay her when of age; and provides

(a) *Wilmot's Rep.* 298. See from p. 309. to 314. See, upon the same subject, but with varying application according to the apparent intent, *Wood* v. *Baron*, 1 *East*, 259. *Bigge* v. *Bensley*, 1 *Bro Ch. Cas.* 190. and *Doe* v. *Ellis*, 9 *East*, 386.

1810.

TENNY, Lessee of AGAR, against AGAR.

that in default of payment she should enter into the nine closes and enjoy them to her and her heirs for ever: and then follow the material words, which shew an intention to narrow into estates tail the estates in fee before given to the son and to the daughter. "And in case my said "son and daughter both happen to die, without leaving "any child or issue, &c. then and in such case only I "devise the reversion, &c. to my cousin *Rd. Agar*" in fee. The estate therefore to *Richard Agar* was only to commence after the extinction of the lines of issue of his own son and daughter; and that intent can only be effected by giving to the son and daughter successive estates tail. And it is unnecessary to wander beyond the case in judgment before us in search of the intent of other testators in other cases, when the intent of this testator speaks so plainly in the will in question. The consequence is, that the son, being tenant in tail, was entitled to suffer the recovery stated, which has barred the remainder to *Richard Agar*.

GROSE J. Though the word *heirs* primâ facie carries the fee, yet it has been long settled that it may be restrained by other words shewing such an intent to mean *heirs of the body*; and the words of the devise over, just mentioned by my Lord, shew that it was intended to be so restrained in this case: that would give the son an estate tail, and then the recovery suffered by him barred the remainder.

LE BLANC J. The plaintiff must make out that *John Agar*, the son, took a fee, with an executory devise over in fee to *Rd. Agar*; for if *John* took an estate tail, or if the limitation over were a contingent remainder, and not

1810.

TENNY, Lessee of AGAR, against AGAR.

an executory devise, *Richard* was barred by the recovery suffered. Now the estate is first limited to *John* and his heirs for ever; and if the will stopped there, he would of course take the fee: but after providing that in case of failure of payment by the son of the sums mentioned to the daughter, she should enter and enjoy the nine closes to her and her heirs for ever, the will proceeds— "and in case my son and daughter both happen to die without leaving any child or issue, &c.;" then he devises the reversion and inheritance to *Richard* in fee. Upon these words the plaintiff's counsel is driven to contend that the intention of the testator was that the son should take such an estate, that supposing the daughter to have lived and had issue, and the son to have died without having any issue, he could have devised the estate away from the daughter and her issue to a stranger, who would have been entitled to hold so long as any issue of the daughter continued in being. But to be driven to argue for such a construction of the intention of the testator in this will, as necessary to give the son a fee, shews that the testator did not intend to give him a fee. On the contrary, his intent appears clearly to have been that the estate should not go over till failure of issue of his son and daughter; and that would give the son and daughter estates tail in succession. And it is a known rule of law in the construction of wills, that if a devise over can take effect as a remainder, it shall not be taken to be an executory devise. There is no case where the words "die without *leaving* issue," simply have been adjudged to mean "without leaving issue *at the time of the death*:" in *Porter* v. *Bradley* there were also the words *behind him*.

1810.

Tenny, Lessee of Agar, against Agar.

Bayley J. The true construction of this will, and such as will best answer the apparent intention of the testator, is that *John Agar*, the son, should take an estate tail only, with remainder in tail by implication to his sister, with remainder in fee to *Richard Agar*. That makes all the estates legal estates, and the devises over estates in remainder; and it is a settled rule that no devise over shall be construed to be an executory devise, which can take effect as a remainder. The testator first devises his estate to his son and his heirs for ever; that would give him a fee: but afterwards he gives it over upon a dying without leaving issue of his son and daughter; and that will narrow the former devise to an estate tail, unless it appeared clearly to have been the testator's intent to look to a dying without leaving issue at the time of the son's death, and not to an indefinite failure of issue: and to shew that, the word *leaving* is relied upon; but it appears that the testator looked not merely to his son dying without issue, but to his daughter also dying without issue, before the devise over was to take effect; which latter could only be for the sake of benefitting his daughter and her issue; and the only way in which that can be done is by giving her an estate tail. It is argued indeed that he merely meant by that to extend the estate given to the son, so as to enable him to dispose of it so long as any issue of his own or of his sister's continued; but that is not the natural way of accounting for the introduction of those words. Suppose *John Agar* the son had died leaving issue, which issue had died immediately after; and then the daughter had died without issue; yet according to the plaintiff's construction, *Richard Agar* would take nothing, because the event would not have happened on

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1810.

TENNY, Lessee of AGAR, against AGAR.

which he contends that the devise over was to take effect; and yet it is plain that the testator meant the devise over to take effect in such an event. Therefore to effectuate his intention the son and daughter must take estates tail, with remainder over to *Richard Agar*. The words dying without issue, or without leaving issue, are to a certain extent equivocal; but they may be explained by other parts of the will; and here there appears to be a clear intent to give an estate tail to the son, with a remainder in tail to the daughter; and a remainder over in fee to *Richard Agar*.

Postea to the Defendants.

AMHURST *against* SKYNNER.

Tuesday, May 15th.

An annuity granted by one who was mortgagor in fee in possession of land, on which it was secured, of greater annual value than the interest of the mortgage and the annuity, is within the exception of the 8th section of the annuity act, 17 *G.* 3. *c.* 26. as a grant of an annuity by one who was *seised in fee simple*; and therefore no memorial of it need be inrolled: the *seisin in fee* there excepted extending in parity of reason to *equitable* as well as *legal* estates. And though a replication, alleging that the grantor was at the time of the annuity granted *seised in fee simple* in possession of the premises on which the annuity was charged, would, abstracted from the subject-matter, by the mere force of the words *seised in fee simple* be considered as alleging a *legal seisin*; yet, with reference to the subject matter, and to the plea, to which it was an answer, which alleged that the grant was made after the annuity act, and that no memorial of it was inrolled according to that act; it shall be taken to mean such an estate as is deemed to be a seisin in fee, within the construction of those words in the annuity act.

IN replevin, the defendant avowed the taking of growing crops as a distress for the arrears of an annuity of 50*l.* granted by the plaintiff to the defendant, by indenture dated 5th of *May* 1804, and issuing out of and charged upon the lands mentioned in the declaration and other lands, for three lives still existing. The plaintiff pleaded, 1st, non est factum. 2dly, That the said indenture was made, and the annuity granted after the act of the 17 *Geo.* 3. *c.* 26. for registering the grants of life annuities, and that no memorial was inrolled within 20 days

1810.

AMHURST *against* SKYNNER.

after the execution of the indenture, according to the directions of that act. 3dly, That the plaintiff was not at the time of making the indenture and of the grant of the annuity seised *in fee simple* or in fee tail in possession of the premises on which the annuity was charged and secured, or of any part thereof, which was or were of equal or greater annual value than the annuity: and that no memorial of the indenture was inrolled according to the act. There was a 4th plea in substance the same as the third. Replication to the 2d plea, that the plaintiff was at the time of making the indenture and of the grant of the annuity *seised in fee simple* in possession of the premises upon which the annuity was charged and secured, and which were then of greater annual value than the annuity. And the like replications to the 3d and 4th pleas. Rejoinder to the replication to the 2d plea, that the plaintiff was not seised in fee simple in possession of the said premises, &c. in manner and form as alleged in that plea: on all which issues were joined; and at the trial before Lord *Ellenborough* C. J. in *Kent* a verdict was found for the defendant on the non est factum, and also on the other issues, subject to the opinion of the Court on this case.

The plaintiff long before the grant of the annuity in question was seised in fee simple in possession of the premises on which the annuity was secured, and on which the distress was taken; and being so seised, by indentures of lease and release of the 7th and 8th of *May* 1793, and of the 19th and 20th of *Jan.* 1796, between the plaintiff and *W. Wilkins*, conveyed the whole of the premises to *Wilkins*, *his heirs* and assigns, by way of mortgage in fee, subject to a proviso for redemption thereof on payment of the several sums of 6000*l.* and 5500*l.*, with interest,

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at certain days therein mentioned long before the granting of the annuity in question. By indentures of lease and release of the 3d and 4th of *March* 1802, the release being of three parts, between *Wm. Crisp*, *Wm. Randall*, and *Thomas Wilders* (the executors and devisees in fee in trust of *Wm. Wilkins* then deceased) of the first part; the plaintiff of the second part; and *Wm. Walter* of the third part; after reciting that *Walter* had advanced 14,000*l.* to the plaintiff, out of which the plaintiff had paid 4240*l.* to *Crisp*, *Randall*, and *Wilders*, they, *Crisp*, *Randall*, and *Wilders*, by the direction of the plaintiff, and the plaintiff for himself, conveyed a part of the premises to *Walter*, his heirs and assigns, by way of mortgage in fee, subject to a proviso for redemption upon the transfer by the plaintiff of 20,511*l.* 11*s.* 11*d.* 3 per cent. cons. on the 4th of *March* 1803, to *Walter*, and payment of interest in the mean time on the 14,000*l.* The mortgage deeds contained the usual proviso for quiet enjoyment. No stock had been transferred pursuant to the proviso, and the principal sums due upon the mortgages, together with a considerable portion of the interest thereon, were unpaid at the time of the grant of the annuity; and the *legal* estate *in fee simple* in the premises then was in *Crisp*, *Randall*, and *Wilders*, and in *Walter*, respectively, by virtue of their several mortgages, subject to the plaintiff's equity of redemption as mortgagor in fee simple. On the 5th of *May* 1804 the plaintiff, being entitled to such equity of redemption, granted the annuity in question by the deed stated in the pleadings, but no memorial thereof was enrolled pursuant to the stat. 17 *G.* 3. *c.* 26. The lands on which the annuity was secured were, at the time of the grant, of greater annual value than the annuity and the interest payable on the above mortgages; and the

1810.

AMHURST *against* SKYNNER.

the plaintiff, at the time of such grant, was in the actual possession of a part of the premises of greater annual value than the annuity. If the defendant were entitled to recover, the verdict for him on all the issues was to stand: if not, a verdict was to be entered for the plaintiff on the two last issues.

Barnewall for the plaintiff contended, first, that one who had mortgaged in fee before the grant of an annuity could not be said to be *seised in fee* within the 8th clause of the annuity act 17 *G.* 3. *c.* 26. which excepts out of the operation of the act annuities secured on lands of equal or greater value whereof the grantor was seised in fee simple or fee tail in possession at the time of the grant. The term *seised* does not apply to one who has a mere equitable estate; the trustee of the legal estate only is *seised*. In *Halsey* v. *Hales* (*a*) the father who was tenant for life, with the ultimate reversion in fee, joined with his son, who had an intermediate remainder in tail, in making an appointment (the power of doing which was reserved to them by the deed to lead the uses of a prior recovery suffered) to the grantee of an annuity for a term of 99 years to secure an annuity for their joint lives; which was held to be within the exception in question: but there the father and son jointly had the entire dominion over the whole fee. The parties there, as Lord *Kenyon* observed, did not want the protection of the act: "they had the control over the whole estate, and were not in the situation of persons who are induced from the imbecility of their title to grant an annuity to a disadvantage." But that is not the situation of a mortgagor;

(*a*) 7 *Term Rep.* 194.

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1810.

ANNUITY against SKYNNER.

he has not the control over his whole eſtate, but is frequently a neceſſitous man who wants the protection of the act as much as any other. The evil meant to be remedied was the ſecrecy of ſuch tranſactions with perſons who having incumbered properties or partial intereſts only to diſpoſe of could not deal with annuitants upon equal terms; the Court therefore will conſtrue the act ſo as to further the remedy, and enlarge the enacting clauſes rather than the exception. A mortgagor holds poſſeſſion of his eſtate at the pleaſure of the mortgagee, who may at any time enter and hold the eſtate; and during that time the annuity cannot be paid; a riſk of which the grantee may avail himſelf to demand higher terms on account of the poſſible inconvenience and loſs. The excepting clauſe, in requiring that the grantor ſhould be ſeiſed *in poſſeſſion*, muſt have intended ſuch a poſſeſſion as he was entitled to hold againſt every other perſon: but a mortgagor, though in poſſeſſion in fact, has in law only a reverſionary intereſt. [Lord *Ellenborough* C. J. The words *in poſſeſſion* ſeem to have been there uſed in contradiſtinction to perſons ſeiſed in fee ſimple or fee tail *in reverſion*. This queſtion was decided by Lord *Thurlow* in *Shrapnel* v. *Vernon* (*a*), who conſidered equitable eſtates to be within the excepting clauſe; and I am not aware that that caſe has been ſince overruled: it ſeems rather to have been confirmed by Lord *Kenyon* in *Halſey* v. *Hales*.] He ſuggeſted that a caſe was now depending in Chancery, in which *Shrapnel* v. *Vernon* would be brought under reviſion. Then, 2dly, the allegation in the pleadings that the plaintiff was at the time of granting the annuity *ſeiſed in fee*, &c. muſt be taken to mean that he was ſeiſed

(*a*) 2 *Bro. Ch. Caſ.* 268.

1810.

AMHURST *against* SKYNNER.

of the *legal* eſtate in fee, &c.; whereas the proof is only of an *equitable* ſeiſin, which does not ſupport the allegation: the true nature of his eſtate ought to have been ſhewn.

Lawes contrà. The two queſtions made reſolve themſelves into one, whether an equitable ſeiſin in fee be within the exception of the annuity act. The act does not ſay, "*legally* ſeiſed in fee," &c., nor does it uſe the common legal words deſcriptive of a fee, as ſeiſed *in his demeſne as of fee*, but merely "*ſeiſed in fee*," and the iſſue is in the ſame general words, and not in technical terms. It does not ſay "*granted* out of the lands," but "*ſecured* upon lands;" and no doubt this annuity is *ſecured* upon the lands, apart from any queſtion upon the annuity act. It is *ſecured* in equity. There is no reaſon for fettering equitable ſeiſins in fee more than legal ſeiſins. The largeſt properties are often ſubject to ſlight charges, which puts the legal eſtate out of the owner of the inheritance. The caſe of *Shrapnel* v. *Vernon* is expreſsly in point; and that was recognized in *Halſey* v. *Hales*, which was a mere power of appointment in the father and ſon, neither of whom had a legal ſeiſin. Many annuities have been granted on the faith of theſe deciſions.

Barnewall in reply ſaid, that *Halſey* v. *Hales* went entirely on the ground that the father and ſon had a complete power over the fee ſimple, and therefore the caſe did not come within the reaſon of the enacting clauſes: but this caſe is within the miſchief meant to be remedied by the act. The conſtruction put upon the act in *Shrapnel* v. *Vernon*, as applied to the caſe of a mortgagor in fee, has never been acted upon at law.

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1810.

AMHURST *against* SKYNNER.

Lord ELLENBOROUGH C. J. Two points have been made; firſt, whether the grantor of this annuity had ſuch a ſeiſin of an eſtate in fee at the time of the grant as is within the exception in the laſt clauſe of the annuity act; ſo as to render it unneceſſary to inrol a memorial of the annuity? He had before conveyed this eſtate by way of mortgage in fee ſubject to a proviſo for redemption, and the equity of redemption remained in him. And the caſe of *Shrapnel* v. *Vernon* eſtabliſhes that there is no difference between legal and equitable eſtates in the conſtruction of this clauſe of the act. If that caſe were well decided, it makes an end of this queſtion. Now upon the only occaſion pointed out where it has been drawn under conſideration, which was before this court in *Halſey* v. *Hales*, it ſeems to be affirmed by the judgment of Lord *Kenyon*. That then is an authority ſufficient to govern this caſe: and after ſo many years have elapſed ſince, and when many other annuitants may have acted upon the faith of it, we ought to ſee very clearly that it was a wrong conſtruction of the act before we overturn it. But it is now too late to reconſider the point on general reaſoning, as if it were res integra. Ld. *Kenyon* in the latter caſe conſidered the exception as referring to perſons having ready marketable eſtates to ſell, over which they had the control, and that equitable eſtates were equally ſaleable with legal eſtates of the ſame deſcription mentioned in the clauſe. And though I cannot but agree with Ld. *Thurlow* in *Shrapnel* v. *Vernon*, that it would have been as well if the act had required annuities of all deſcriptions to be inrolled, whatever was the nature of the eſtates on which they were ſecured; yet this caſe falls within the conſtruction which has been put upon the excepting clauſe. It is found that this eſtate was of an

1810.
Annuity against Saunders.

annual value more than sufficient to pay the annuity and the intereft of the mortgage. Then with refpect to the other objection, I agree with the plaintiff's counfel that when it is faid in pleading that a party was *feifed in fee*, I fhould underftand by that a *legal* feifin in fee: that is the obvious and proper fenfe of the words: but when thofe words are introduced, as they are, in thefe pleadings with reference to the inrolment of a memorial according to the directions of the annuity act, I think I muft conftrue them, fecundum fubjectam materiam, as connected with the act of parliament to which they refer, and that thofe words muft have the fame conftruction in the pleadings as they have in the annuity act where they alfo occur. There is then an allegation of a feifin in fee, with reference to the obligation impofed by the annuity act to inrol a memorial, and not of a feifin in fee at common law. However, as it is fuggefted that the fame queftion upon the conftruction of the act is now depending in a cafe in Chancery, fhould the propriety of the decifions in *Shrapnel* v. *Vernon*, and *Halfey* v. *Hales*, be called in queftion in that court, fo as to fhake their authority, we fhall have an opportunity of re-confidering our judgment in the courfe of the term, by only giving judgment nifi at prefent.

Grose J. The true queftion raifed by the pleadings is, whether the grantor of this annuity were feifed in fee fimple in poffeffion within the meaning of the annuity act, at the time of the grant? and confidering what the object of the act was, and the general words ufed, and the decifions which have put a conftruction upon thofe words, I muft confider it as an allegation of a feifin in fee with reference to the meaning of thofe words in the annuity

annuity act, which has been decided to include an equitable seisin in fee. And not being prepared to over-rule those decisions, I must consider such a seisin to be sufficient to take the case out of the act.

LE BLANC J. The first question is upon the allegation in the pleadings. The second plea objects to the grant of the annuity as not having been registered according to the directions of the act: the replication is in answer to that, and alleges that the grantor was seised in fee simple in possession of the premises at the time of the grant: and that brings it to the question whether he were so seised within the meaning of the annuity act; and is the same as if the allegation had been that he was so seised within the meaning of that act. Then the second question arises, whether a party seised of an equitable estate in fee be within the exception of the 8th clause? And that was expressly decided in the affirmative by Lord *Thurlow* in *Shrapnel* v. *Vernon*; and when it came under consideration again in this Court, in *Halsey* v. *Hales*, Lord *Kenyon* adopted that decision, and held that a legal seisin in fee was not necessary to bring the case within the exception. When, therefore, a construction has been put upon a modern act of parliament, within 11 years after the passing of it, and persons have acted upon the faith of it, and when that decision has been recognized 10 years afterwards, we must now consider ourselves bound by it, and that a party, who was seised of an equitable estate in fee at the time of granting the annuity, was *seised in fee* within the meaning of the annuity act.

BAYLEY J. At the time when the annuity act passed, it was considered that persons having only life estates were

1810.

AMHURST *against* SKYNNER.

were under great diſadvantage in going into the market to raiſe money by the grant of annuities, and it was to benefit and protect perſons of that deſcription that the act was paſſed; and therefore an exception was made of perſons who were ſeiſed of eſtates in fee ſimple or fee tail in poſſeſſion. Now as all perſons having ſuch eſtates, whether in equity or at law, were conſidered to have eſtates which they could carry to market, and diſpoſe of at a fair value, and that it was optional in them to raiſe money by way of annuity, or otherwiſe, they were alike conſidered as not within the reaſon of the law: and within a few years after the act paſſed we find a deciſion by Lord *Thurlow*, that an equitable ſeiſin in fee was ſufficient to bring the caſe within the exception. If that deciſion had been deemed wrong, an opportunity of rectifying it would probably ſoon have occurred; but on the contrary, in the only inſtance which can be found, where that deciſion ever came in queſtion, it was recognized and acted upon in this court: the queſtion, therefore, muſt be conſidered as decided.

Poſtea to the Defendant (*a*).

(*a*) The ſame point was once before decided in this Court, in a caſe of *Cumming* v. *Sir Wm. Twyſden*, in *M.* 29 *Geo.* 3. *Erſkine* had obtained a rule calling on the plaintiff to ſhew cauſe why the judgment on the annuity bond ſhould not be ſet aſide for want of a memorial inrolled according to the annuity act. The anſwer given was, that Sir *Wm. Twyſden* was tenant in tail at the time of the premiſes on which the annuity was ſecured, and therefore within the exception of the act: but it appeared that his father before the ſettlement on the defendant in tail had mortgaged the premiſes in fee, and the ſettlement was made ſubject to that mortgage; ſo that at the time of the grant the defendant had only an equity of redemption, which it was contended was not within the excepting clauſe. But this objection was over-ruled by the Court; and Lord *Kenyon* C. J. ſaid he had no doubt that a perſon who had a real equity of redemption ſufficient to anſwer the annuity was never intended to come within the general proviſions of the act.

1810.

HUDSON and ſeven Others *againſt* MUCKLOW.

Friday, May 18th.

The ſeveral *king's waiters* in the port of *London* hold ſeparate offices by different patents; and though the fees are in the firſt inſtance paid by the merchant in one entire ſum to a common receiver for all; yet the aliquot ſhares of each are ſeparate, and each is entitled to call for his ſhare when in fact the ſum to be received is capable of being divided. Theſe ſhares are now fixed by the ſtat. 38 Geo. 3. c. 86. at nineteen, and as the patentees die the emoluments of each office are to be carried to a ſuperannuation fund for the benefit of aged and diſabled officers of the cuſtoms, and are not to be applied to the benefit of the ſurviving patent king's waiters, which before that act had been practiſed.

THIS was an action for money had and received brought by the plaintiffs to try their right to certain fees of office, in which they recovered a verdict for 2145*l.* 19*s.* 3*d.* ſubject to the opinion of the Court upon the following caſe.

The plaintiffs are the ſurviving king's waiters in the port of *London*. The defendant is clerk of the rates in the port of *London*, and received the ſum found by the verdict *as the king's waiters' fees*. The origin of king's waiters cannot be traced, but they have exiſted under that denomination certainly as early as the reign of *James* I. The number at the time of paſſing the act of tonnage and poundage, 12 *Car.* 2. *c.* 4. was 18; afterwards they were 19: how their number was increaſed is not known. The order of the Houſe of Commons annexed to and eſtabliſhed by ſt. 12 *Car.* 2. *c.* 4. mentions the king's waiters and their fees in the following terms—To the king's majeſty's waiters in the port of *London*, being in number 18.

	s.	*d.*
For every whole fee warrant for goods imported by freemen of *London* - - - - -	1	0
For every half fee warrant for ditto ditto -	0	6
For every whole fee warrant for goods imported by perſons not ſuch freemen - - -	1	0
For every half fee warrant for ditto ditto -	0	6
For every alien's whole fee warrant for goods imported - - - - - - -	1	6
For every half fee warrant for ditto - -	0	9
For every return on coaſt cocquets - -	0	6
For every foreign certificate, coaſtwiſe - -	1	0

The

1810.

HUDSON *against* MUCKLOW.

The vacancies were filled up, as the patentees dropped off, by fresh patents granted from time to time, and the number kept up to 19 down to the year 1785; since which time no patents have been granted. Each person has a separate grant, by letters patent, all in the same form; which is as follows:

"George the third, &c. Know ye that we of our spe-"cial grace, certain knowledge, and mere motion, have "constituted and appointed, and by these presents do "constitute and appoint our well beloved *Robert Smith* "Esq. to the office of *one of our waiters* in the port of "*London*, and in all and singular the ports, places, and "creeks thereto belonging or adjoining, in the room and "place of *Samuel Clarke* Esq. deceased: to have, hold, "exercise, and enjoy the said office to him the said *Ro-*"*bert Smith*, during our pleasure, together with all and "singular the wages, fees, profits, perquisites, advantages, "and emoluments whatsoever, to the said office or place "in any manner belonging or relating, and *in as ample* "*manner and form* as the said *Samuel Clarke* or any other "person or persons lately exercising the said office hath or "have had or received, or ought to have had and re-"ceived by reason thereof. In witness," &c.

By warrant from the lords commissioners of the treasury, the emoluments are a salary to each of 52*l.* paid by the public, and the above-mentioned fees, which are paid by the merchants. *These fees, whatever was the existing number of patentees, were received from the merchant entire,* and till 1797 were always divided, monthly, among the king's waiters for the time being, that is, from the earliest times down to 1785, into 19 shares, and in some cases of vacancy into 18, each taking one; and from that year until *Sept.* 1797 into 18. 17. 16. 15. or 14 shares, ac-

cording

cording to the actual number of king's waiters. And the money found by the verdict, arising from such fees received by the defendant as is hereafter mentioned, is claimed by the present plaintiffs, the surviving patentees, as received by the defendant to their use, since they were such survivors. The duties of the king's waiters have, for these last 60 years at least, been performed partly by deputies, one appointed by each patentee; the payment of which deputies was and is derived from other sources; and partly by acting king's waiters, appointed by the Treasury in the place of the deputies of those patentees whose patents were prohibited to be renewed by the stat. 38 *Geo.* 3. *c.* 86. On the 4th of *August* 1797 the commissioners of the customs made the following board-minute: "The clerk of rates being reported by the bench officers to be the collector of the fees payable to the respective patent king's waiters, he is to take especial care that the fees received for the vacant offices of that description are in future paid into the hands of the collector inwards, who is to be furnished by the clerk of the rates with a list of the vacancies now existing in the office of the patent king's waiters; and such fees are to be paid over by the collector inwards to the receiver-general, conformably to the directions of the lords of the treasury. And the clerk of the rates is, in case of future vacancies of patent king's waiters, immediately to state the same to the board, to the end that the patent fees may in like manner be paid into the hands of the collector inwards, and be by him paid over to the receiver-general." At the next monthly meeting of the patentees, 4th *Sept.* 1797, the then clerk of the rates and receiver of these fees communicated this minute to them. There were then five vacancies; and the collector, instead of dividing the fees

1810.

HUDSON against MUCKLOW.

into fourteen parts, and paying one-fourteenth to each patentee, divided the fees into nineteen parts, giving each patentee one-nineteenth, and retained the five-nineteenths in his own hands. The patentees received each one-nineteenth, but under repeated declarations of their non-acquiescence. The present defendant has acted in the same way since he came into office in 1799; dividing the fees by nineteen, giving one-nineteenth to each existing patentee, and retaining the other money in his hands, which is now, with the assent of all parties, to be paid into the court of Exchequer; it being claimed, on behalf of the superannuation fund, by his majesty's attorney-general. The stat. 38 *G.* 3. *c.* 86. *s.* 1, 2. 4. 10. 13., which received the royal assent 28th *June* 1798, the stat. 40 *G.* 3. *c.* 82., and 47 *G.* 3. *st.* 1. *c.* 51. *s.* 9. bear materially on the present question. On the 17th *Nov* 1797, Mr. *Syms*, the then clerk of the rates and receiver of these fees, paid that part of the retained fees then in his hands to the collector inwards, which he had not done before. The patentees remonstrated against this, but he continued to do so while he remained in office and as long as he received the fees. The question was, whether the plaintiffs were entitled to recover? if they were, the verdict was to stand; if not, a nonsuit was to be entered.

Dampier, for the plaintiffs, contended that the office was *one*, though executed by as many patentees as the king thought proper to grant it to; and the fees were entire when paid by the merchant, though afterwards divisible into shares according to the existing number of the patentees at different periods. The shrievalty of *Middlesex* is but one office, though executed by two persons. As

vacancies

1810.

HUDSON *against* MUCKLOW.

vacancies happened before the year 1785, the proportions of the remaining patentees were increased till the vacancies were filled up by fresh grants: and from that time till 1797, as vacancies happened, which were not filled up, the proportions of the remaining patentees continued to increase. The patents, under which the present possessors hold, grant to them respectively to hold the office, together with all fees, advantages, &c. to the same belonging, *in as ample* manner and *form* as their predecessors: but if the jus accrescendi be taken from them, they cannot be said to hold the office with the same advantages as their predecessors. Such being the nature of this office, the only question is whether the rights of the existing patentees were altered by the stat. 38 *G.* 3. *c.* 86.? The first section abolishes several offices in the customs, not including this. The second section, which includes the king's 19 waiters in the port of *London*, with other offices, being offices in part useful, enacts that none of them shall after the passing of the act be granted to any person, except as after mentioned; that such of them as were then vacant should be abolished, save as thereinafter provided; and that such as should thereafter become vacant should be abolished, save as thereinafter mentioned. *Sect.* 3. provides that the officers before-mentioned should not be compelled to any other attendance on the duty of their several offices during the existing grants than heretofore. *Sect.* 4. enables the commissioners of the customs, with the approbation of the treasury, to provide proper persons to execute during pleasure the duties of the vacant offices, and of such as shall become vacant, which shall appear to them to be necessary and useful. *Sect.* 13, reciting that a superannuation fund had been long established under the

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1810.

HUDSON *against* MUCKLOW.

commiſſioners of the cuſtoms, for the benefit of aged and diſabled officers, and that ſums had been received as fees of various offices during their vacancy, and that it would promote the good of the ſervice if ſuch ſums were to be applied in augmentation of the ſaid fund, enacts, that the fees of *offices ſo aboliſhed and vacant as aforeſaid* ſhall be applied in augmentation of the fund as any four or more of the commiſſioners ſhall direct. But this ſtatute, he contended, left the queſtion untouched; for ſo long as any one patentee was alive, the office was neither aboliſhed nor vacant, and therefore the proviſions of the act for appropriating the fees to the ſuperannuation fund did not apply.

Taddy contrà was ſtopped by the Court.

Lord ELLENBOROUGH C. J. It would be quite contrary to the plain object of the act, which was to raiſe a ſuperannuation fund out of the vacant offices, and as they ſhould become vacant, to ſay that the increaſe of fees, upon vacancies happening in the former number of 19 king's waiters, ſhould be applied to the benefit of the remaining patentees, inſtead of being carried to that fund. There may be ſome little obſcurity in the wording of the act, but the meaning of it is obvious. The offices were diſtinct, and were granted by diſtinct patents to each officer, although they had one common duty to perform. The fees, indeed, were paid in the firſt inſtance into the hands of a common receiver, becauſe from the ſmallneſs of the ſums they could not be divided amongſt all the 19 officers; but the right of each to his aliquot part was the ſame, and each was entitled to a diviſion in fact,

when

when the ſums received were in fact capable of being divided.

GROSE J. The patent itſelf ſpeaks moſt plainly that theſe were ſeparate offices; for the king appoints "to the *office of one of our waiters* in the port of *London*;" and it would be a direct violation of the declared intention of the legiſlature to hold that the profits of the vacant offices ſhould not go to the ſuperrannuation fund, but to the other remaining officers.

LE BLANC J. It is not neceſſary to conſider what the office of king's waiter in the port of *London* was before the late act of parliament; for that act has diſtinctly conſidered theſe as ſeparate officers: it ſeparates the office if it were one before, and it ſeparates the emoluments if before they were entire. The duties of the officers are alſo ſeparated; for it provides that they ſhall not be compelled to any other attendance on the duty of their ſeveral offices, during the continuance of the exiſting grants, than they had before given: that was with a view to the vacancies as they happened not being filled up; but the performance of the neceſſary duties was to be provided for in another manner; and as each office became vacant the emoluments of it were to go to the ſuperannuation fund.

BAYLEY J. The vacancies were directed not to be filled up as they happened, for the benefit of the public, and not of the remaining officers: and the meaning of the legiſlature was, that as vacancies occurred they were to be conſidered, with reſpect to the emoluments, as if they had been filled up by perſons who were to receive the

1810.

Hudson *against* Mucklow.

emoluments in truſt for the public. I ſay for the benefit of the public; becauſe if the fees were to be applied to the increaſe of the profits of the other officers, the public would be deprived of theſe means of providing for their ſuperannuated officers, and would be obliged to reſort to other means for the ſame purpoſe.

Judgment of nonſuit entered.

The King *againſt* The Juſtices of Staffordshire.

It ſeems that no ſociety is within the intent and meaning of the Friendly Society act 33 *Geo.* 3. *c.* 54 ſo as to require the juſtices in ſeſſions to allow and confirm their rules, &c. in the manner therein provided for, if it appear that the general objects of ſuch ſociety are not confined to the charitable relief and maintenance of its old, ſick, and infirm members, their widows and children.

CLIFFORD applied for a mandamus to the defendants to annul and make void all ſuch rules, orders, and regulations, hereafter mentioned, as ſhould be repugnant to the act of the 33 *G.* 3. *c.* 54. for the encouragement and relief of friendly ſocieties, and to allow and confirm all ſuch of the ſaid rules, &c. as ſhould be conformable to the true intent and meaning of the ſaid act. This was moved upon an affidavit ſtating, that at the *October* ſeſſions 1809 the rules and regulations hereafter mentioned of a certain ſociety therein deſcribed, called by the name of "the Benevolent Society of Roman Catholic Secular "Clergy Prieſts, eſtabliſhed for their mutual relief and "aſſiſtance in ſickneſs, infirmity, old age, and ſo forth, "incapacitating them to attend to the duties of their "ſtate of life," were exhibited to the ſaid juſtices in ſeſſions and ſubjected to their review, in order that the ſame might be ſigned by, and a duplicate thereof on parchment depoſited with and filed by the clerk of the peace at ſuch ſeſſions. That the juſtices adjourned the conſideration of the matter to the next ſeſſions, when application was again made to them to allow and confirm the ſaid

1810.

The KING against The Justices of STAFFORDSHIRE.

said rules and regulations, or such of them as were conformable to the statute made in that behalf, and were not otherwise contrary to law; in order that the same might be then signed, deposited, and filed as aforesaid; but the majority of the justices rejected the application altogether.

The rules referred to were, inter alia, 1st, That the society shall consist only of Roman Catholic secular clergy priests, who reside within the counties of *Stafford*, *Salop*, *Derby*, *Worcester*, *Warwick*, and *Oxford*. 2d, That all Roman Catholic secular clergy priests now officiating with the full powers of their order in any of those counties are, and all such persons as shall be received by the existing superior Roman Catholic clergymen to officiate in like manner, in any of the said counties, may become members on application to the society, and by contributing to the common stock not less than 5 guineas on admission. The 3d and 4th regulated the appointment of officers among themselves for managing the affairs of the society. The 5th and 6th regulated the management of their funds by an administrator and his assistants. And by the 7th the administrator was prohibited from making payment to any of the members without the consent of the general meeting, or of the existing superior Roman Catholic clergyman of the above counties. By the 8th it was provided that the said superior, being a Roman Catholic secular clergyman, should during his life have a tenth of the yearly income of the society, if he required it. The 9th, 10th, and 11th respected the management of the funds and accounts. And by the 12th any member of this society incapacitated from attending to the duties of his state of life by infirmity, sickness, old age, and so forth,

1810.

The KING against The Justices of STAFFORDSHIRE.

forth, was entitled to receive during ſuch incapacity ſuch ſum as ſhould be voted to him by a majority of the members preſent at a general meeting, for his comfortable and decent ſupport; but if there appeared cauſe, from miſconduct or other reaſon, to the members preſent, they might refuſe relief; provided that the exiſting ſuperior and a majority of the members preſent agreed in ſuch their vote: and the members ſo voting ſhould not be liable to account for their vote or motion to any but to God. By the 13th, the ſociety and fund were to continue ſo long as any twelve members were ſo diſpoſed; and if any member propoſed a diſſolution of the ſociety or a diviſion of the fund, he was to be expelled.

The Court afterwards, upon hearing counſel, diſcharged the rule in this term. I was not preſent at the time; but I underſtood that the Court were of opinion that the caſe was not within the meaning of the act of parliament; the object of the ſociety not being confined to the charitable relief and maintenance of its old, ſick, and infirm members.

BROWN and IRISH *against* VIGNE.

Friday, May 18th.

A ship was insured from *London* to any port or ports in the river *Plate* until her arrival at her *last* port of discharge in that river; and the master intending to discharge her cargo at *Buenos Ayres*, passed *Maldonado*; but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video* with intent to make a complete discharge there if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres*, if it should afterwards be practicable; but while he was still discharging part of his cargo at *Monte Video* a loss happened by a peril of the sea: held that as *Buenos Ayres*, to which other port only in the *Plate* he had contemplated to go, was at the time of his arrival in the *Plate* (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video* must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged.

THIS was an action upon a policy of insurance brought to recover against an underwriter a salvage loss of 24*l.* 3*s.* 2*d.* per cent.: and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs, subject to the opinion of the Court upon this case.

The ship *Ann*, valued at 1500*l.* was insured at and from *London to any port or ports in the river* Plate, with or without letters of mark, *until her arrival at her last port of discharge in the river* Plate. The plaintiffs were owners of the ship *Ann*, of which the plaintiff *Irish* was master, which in *Nov.* 1806 sailed from the port of *London* upon the voyage insured, and on the 13th of *Feb.* 1807 arrived in the river *Plate*, and was on that day spoken to by his majesty's ship the *Unicorn*, the captain of which informed the master of the *Ann*, that *Buenos Ayres* had been retaken from the *British* and was then in possession of the *Spaniards*. In consequence of this information the master of the *Ann* put into the port of *Monte Video*, which was then in possession of the *British*. On the 20th of *Feb.* the *Ann* was removed to the place of delivery and there moored in safety: and on the 21st, part of the cargo, consisting of iron, spirits, and porter, was discharged; and between that day and the 6th of *March* following other parts of the cargo were landed; and on the latter day, while she was so moored, the *Harriet* transport, in a gale of wind,

drove

1810.

BROWN *against* VIGNE.

drove athwart the hause of the *Ann*, and on the 8th of the same month the *Ocean* transport also, in a gale of wind, ran foul of the *Ann*; by which accidents she sustained damage. The captain afterwards discharged the remainder of the cargo; and having done so, a survey was held upon the *Ann*, in consequence of which the ship and materials were afterwards sold, and a loss sustained by the plaintiffs; which, if they were entitled to recover, was agreed to be 24*l*. 3*s*. 2*d*. per cent. upon the defendant's subscription. When the *Ann* sailed from *England* the captain intended to proceed to *Buenos Ayres*. When he afterwards put into *Monte Video*, he intended, provided he could find a favourable market there, to dispose of his cargo at that place, and to finish the voyage; but not finding so favourable a market at *Monte Video* as he expected, he had not at the time of the loss abandoned his intention of proceeding to *Buenos Ayres*, provided it should afterwards be practicable. *Buenos Ayres* was recaptured by the *Spaniards* in *Aug*. 1806, and has from that time to the present remained in their possession. The *British* armament under the command of General *Whitelock* sailed from *Monte Video* in *June* 1807 for the purpose of attacking *Buenos Ayres*, but the attack failed. Open war was waged between his majesty and the king of *Spain*, from 1805 till *Aug*. 1808. The question was, whether the voyage insured under the above facts were or were not terminated at the time of the accident which occasioned the loss?

Richardson, for the plaintiffs, contended that as the master had not abandoned his original intention to proceed to *Buenos Ayres*, the voyage outwards was not ended, and the underwriters were still upon the policy, which

was

was from port to port until the ship's arrival at her last port of discharge in the river *Plate*. [Lord *Ellenborough* C. J. Does not *the last port of discharge* mean the last practicable port? The master could not have gone into *Buenos Ayres* which was then an enemy's port; and was he at liberty to protract the voyage for that purpose till peace was restored? You would read the policy as if it were, until her arrival at her *wished-for* port. *Bayley* J. Must not *any port or ports* be understood to be confined to *friendly* ports?] While there is a possibility of the obstruction being removed within a reasonable time, the risk of the underwriters continues. The case which comes nearest to the present is *Blackenhagen* v. *The London Assurance Company* (*a*). There the ship, being bound under convoy from *London* to *Reval*, on the 5th of *Nov.* learnt in the course of her voyage that an embargo was laid on all *British* ships in the ports of *Russia*, in consequence of which the convoy with the fleet put back first into *Copenhagen* roads and then off *Gottenburgh*; waiting as it seems, to see if the embargo would be taken off; and on the 30th of *Nov.* the convoy and fleet sailed for *England*, and was last seen on the 3d of *Dec.* in a heavy gale of wind. Ld. *Ellenborough* C. J. nonsuited the plaintiff in the first action on the policy; considering the returning to *England* as an abandonment of the voyage. Then another action was brought in *C. B.*, in which the jury, to whom the question of abandonment was left by the Lord Chief Justice of *C. B.* found a verdict for the plaintiff; which that Court afterwards set aside: but on the second trial, the jury having found the fact that the voyage was not abandoned, the Court of *C. B.* refused to set aside the verdict. But even upon the first trial before Lord *Ellen-borough*,

(*a*) 1 *Campb. N. P. Cas.* 454. 564.

1810.

BROWN *against* VIANT.

borough, his Lordship said that if the ship, being unable to get to *Reval*, had lingered in that quarter, or had necessarily returned with an intention of ultimately completing the original voyage, a question of nicety would have arisen (*a*). [Lord *Ellenborough* C. J. There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo; or as in a case which occurred before Lord *Kenyon*, where a ship, bound to a port in the *Baltic*, found it on her approach blocked up by ice; on which she put back, but afterwards on a thaw sailed again; and Lord *Kenyon* held that she was still under the policy (*b*). But here the port of destination was in a state of open hostility at the time; which cannot be considered as a mere temporary obstruction.] The voyage here insured was a coasting voyage from port to port in the river *Plate*: and therefore greater delay in the voyage was contemplated than had actually occurred before the loss took place: and the underwriters wish to avail themselves of the intention of the master to go to *Buenos Ayres*, in order to put an end to the voyage, by the event which had happened there, before the master himself had contemplated to put an end to it. Would the capture of the destined port by an enemy while the ship is proceeding

(*a*) According to the report of the same case by Mr. *Park*, p. 226. of the 6th edit. Lord *Ellenborough* C. J. said that "though a ship *from necessity* might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That such a necessity might perhaps even justify a return to *England* if it could be proved satisfactorily that it was the intention of the parties to seize the first favourable opportunity of returning to *Reval*."

(*b*) If this be the same case, mentioned by his Lordship on the trial of *Blackenhagen* v. *The London Assurance Company*, as is mentioned in Mr. *Campbell*'s Report, p. 455. it appears that the ship, when prevented from reaching her destined port by the ice, "took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season."

on her voyage put an end to it and discharge the underwriters? [*Le Blanc* and *Bayley*, Justices, agreed that it would not, until the event were known to the ship.] It has indeed been considered that after the port of destination has been shut, by order of the enemy, against ships of the nation to which the assured belongs, he cannot abandon and recover as for a total loss (*a*).

Carr contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. The policy is upon the ship until her arrival at her last port of discharge in the river *Plate*: there are three known ports in the river *Plate*; *Maldonado*, *Monte Video*, and *Buenos Ayres*; and we may suppose the insurance to have been to these ports by name until her arrival at the last of them. Now the ship had passed by *Maldonado*, and had arrived at *Monte Video*, and she could not legally go to *Buenos Ayres* which was then in the hands of an enemy. If then the voyage did not end at *Monte Video*, as the last port of discharge, as soon as it was ascertained that she could not proceed to *Buenos Ayres*, when was it to end? It would never end till a peace was restored which would enable the ship to proceed to *Buenos Ayres*, if the master thought it proper to wait for that event.

GROSE J. agreed.

LE BLANC J. The Court must look in this case to the time when the vessel arrived in the river *Plate*; and then the master being informed that *Buenos Ayres* was in the hands of the enemy, and that she could not go there as he

(*a*) Vide *Hadkinson* v. *Robinson*, 3 *Bos. & Pull.* 388.

1810.

BROWN against VIGNE.

had intended, put into the port of *Monte Video*, and began to discharge her cargo there: and he never contemplated going to any other port than these two: *Monte Video*, therefore, must be considered as her last port of discharge.

BAYLEY J. It is said that the insurance was to *any port* or *ports* in the river *Plate*; but that must be understood to any *friendly* port. Now, after having passed *Maldonado*, and gone to *Monte Video*, there was no other friendly port in the river *Plate* to which the ship could have gone.

Postea to the Defendant.

Friday, May 18th.

DOE, on the several Demises of WILLIAM, ELIZABETH, and JOHN, USHER, *against* SAMUEL JESSEP.

Under a devise to *A.* (a natural son) then under age, and the heirs of his body; and "if he die before 21, *and* without issue," then over to other relations, and ultimately to the testator's own right heirs: held that *A.* having attained 21, the limitations over did not take effect; as, by the natural sense of the word "*and*," they were made to depend upon the happening of both events, i. e the son's dying before 21, *and* without issue.

And this construction was not varied by a codicil made *after* the son attained 21, by which the testator *confirmed* every part of his will *so far as his affairs were consistent*.

IN ejectment to recover possession of a freehold estate at *Brentford* in the parish of *Ealing*, in *Middlesex*, the plaintiff declared on the joint demises of the three lessors of the plaintiff, and also on their separate demises, which were laid on the 1st of *Jan.* 1810. A verdict was found at the sittings for the defendant, subject to the opinion of the Court upon the following case:

John Jessep, being seised in fee of the premises in question, by his will, dated 20th of *April* 1779, devised all his freehold and copyhold messuages, lands, &c, in the parish of *Ealing* (the copyhold being surrendered to the use of

his

1810.

DOE, Lessee of USHER, against JESSEP.

his will) unto *S. Clarke*, *Wm. Usher*, and *D. Goldwin*, their heirs and assigns, " in trust to and for my natural " son *John Jessep*, an infant of the age of 15 years, whom " I had by *Mary Clarke*, and the heirs of his body law- " fully issuing for ever. And my will further is, that if " the said *John Jessip* shall happen to die before he at- " tains his age of 21 years, *and without issue* lawfully to " be begotten, then I devise all the aforesaid freehold " and copyhold messuages, lands, &c. unto the said " *S. C.*, *W. U.*, and *D. G.*, and their heirs and assigns, " upon further trust, and for the uses hereinafter men- " tioned, viz. that they my said trustees shall and do " permit and suffer my father *John Jessip* and the said " *Mary Clarke* to receive the rents, issues and profits of " all my aforesaid messuages, &c. and premises, equally " to be divided between them, share and share alike, for " and during the term of their natural lives and the life " of the longest liver of them: and that upon the death " of either of them, the share of him or her so dying my " will is shall go and be received by the survivor during " his or her life: and that from and immediately after the " decease of my said father and the said *Mary Clarke*, then " upon further trust to and for the use and behoof of *Wil- " liam Usher*, *Elizabeth Usher*, and *John Usher*, the children " of the aforesaid *Wm. Usher* and *Elizabeth* his wife, " equally to be divided between them or amongst them, " if more than one, share and share alike, as tenants in " common and not as joint tenants, and the heirs of their " respective bodies issuing; and in case any of them " shall happen to die without issue, then as to the part " or share, parts or shares of such child or children so " dying, or whose issue shall fail, to the use of the sur- " vivors or survivor, and others and other of them, and

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1810.

Doe, Lessee of Usher, against Jessep.

" the heirs of their respective bodies: and if there shall " be failure of issue of all the said children but one, or " if there shall be but one child, then to the use of such " remaining or only child, and the heirs of his or her " body issuing; and, *for default of such issue*, to the use " and behoof of my own right heirs for ever." The will then proceeded to dispose of the testator's personal property, and amongst other things contained a bequest of the dividends of 1000*l*. stock to *Mary Clarke* for life; and after her decease, the principal to be paid or transferred to the said *John Jessep* at his age of 21 years; with a gift over to the lessors of the plaintiff, if he should not attain 21, to be transferred to them also at 21: and, after some other legacies, the residue of the personal estate was bequeathed to the said *John Jessep*: and if he should happen to die before he attained his age of 21 years, to *Elizabeth Usher*, the mother of the lessors of the plaintiff: and the trustees were appointed executors. The devisor by a codicil, dated 26th *Nov*. 1786, devised certain copyhold estates purchased since making the will to *Mary Clarke* for life; remainder to the said *John Jessep* in fee; and appointed him executor, instead of the persons named in the will: and concluded thus—" I do hereby by this my " codicil *confirm* every other part and parts of my said " will, *so far as my affairs are consistent*; I do desire that " this my codicil may be added to my said will." The will and codicil were respectively executed so as to pass real estates; and at the time of the execution of the codicil *John Jessep*, the natural son of the devisor, and the devisee named in his will, had attained his age of 21 years. The devisor died, leaving his natural son *John Jessep*, his father *John Jessep*, and *Mary Clarke*, him surviving. *John Jessep* the father, and *Mary Clarke*, both died before *John*

 Jessep

Jessep, the natural son and devisee, who died in 1807, without issue, *having attained* 21 *before the making of the codicil*, and without having suffered a recovery of the freehold property devised by the will. The lessors of the plaintiff are the devisees in remainder named in the will: and the defendant is the heir at law of the devisor; and upon the death of the natural son entered into and is now possessed of the premises. If the plaintiff were not entitled to recover, the verdict was to stand: but if he were, the present verdict was to be set aside, and a verdict entered for the plaintiff.

Gaselee for the plaintiff, stated the principal question to be, whether upon the construction of the will, the limitation to the lessors of the plaintiff was to take effect upon the death of the testator's natural son without issue at any time, or only in the event of his death under the age of 21? and he contended for the former. But if that were against him, supposing the case had stood alone upon the will; yet as the codicil was made after the son had attained 21, in which the testator confirmed the will *so far as his affairs were consistent*; that is, so far as the circumstances which had since occurred were consistent with the provisions of the will; he contended that the testator must have intended that the devise over to the lessors of the plaintiff should take effect, if the son died at any time without issue. The Courts have in many cases read *and* as *or*, and *or* as *and*, according as the one or other construction would best effectuate the intention of the testator. [Lord *Ellenborough* C. J. I should suppose the natural intention of the testator was, that if the son attained 21, he should have the power of disposing of the

1810.

Doe, Lessee of Usher, against Jessep.

estate: and that if he died before 21, leaving issue, the issue should take. *Le Blanc* J. The construction contended for on the part of the plaintiff would be against all the cases where the Court have read *or* as *and* in order to avoid the estate going over from the issue, in case the first taker died before 21 leaving issue.] Admitting that the plaintiff's construction would have that effect; yet, as Lord *Holt* said in *Helliard* v. *Jennings* (*a*), it may have been the intention of the testator to restrain the marriage of his son before he was of age. At any rate the case of *Brownsword* v. *Edwards* (*b*) is directly in point. That was a devise to trustees and their heirs to receive the rents until *John Brownsword* should attain 21: and if he should live to attain 21 *or* have issue, then to him and the heirs of his body: but if he should die before 21 *and* without issue, then the devise was in like manner to *Sarah Brownsword* an infant; with devises over to other collateral branches of the testator's family; and for want of such issue to his own right heirs. *John* and *Sarah* were the testator's children by a second wife, the sister of his first: *John* attained 21, and afterwards died without issue: and Lord *Hardwicke* construed the word *and* as *or*, and decreed that the remainder should take effect. But if this were otherwise, upon the construction of the will alone, and the remainder over was only to take effect in case the son both died before 21 *and* without issue; yet the reasonable construction of the codicil which confirms the will *as far as his affairs* (*i. e.* events) *were consistent with it*, being made after one of the events was gone by, must be to confirm the remainder over upon the happening of the other event.

(*a*) 1 *Ld. Ray.* 506. but see S. C. 1 *Freem.* 509. (*b*) 2 *Vez.* 243.

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Lord Ellenborough C. J. The cases certainly run very near; the only distinction seems to be that the limitation over in *Brownsword* v. *Edwards* was in favour of a daughter, who, without such a construction as was there put on the word *and*, would have been left without any provision: and here the limitation over is to other relatives. But is there not a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result from so construing them. Now here the testator has used the copulative word *and*, and has devised his estate over in case his son died before 21 *and* without issue; that is, if both those events happened: why then should we read *and* as *or*, and give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense? Then, as to the codicil, the testator confirmed his will *so far as his affairs were consistent with it*; that is, so far as his affairs remained in the same state as when he made his will: but the affairs were altered in the mean time in this respect; for the son had attained 21, and therefore one of the events could no longer take place, upon the happening of which the limitation over was to take effect: the codicil, therefore, does not apply to that part of the will.

Grose J. agreed.

Le Blanc J. This is so far distinguishable from *Brownsword* v. *Edwards*, that there the word *and* was construed *or*, to prevent the working of an injury to the issue: here *and* is required to be construed *or* in order to work the very injury, to avoid which, in other cases, the Courts

1810.

Doe, Lessee of Usher, against Jessey.

have construed *or* to be *and*. Then reading it in the natural sense of the word, the son having attained 21, the limitation over, which was only to take effect if he died before 21 *and* without issue, was defeated.

Bayley J. If the son had died under 21, leaving issue, the construction contended for by the plaintiff's counsel would have left the testator intestate as to such issue, which was clearly against his intention.

Postea to the Defendant.

Friday, May 18th.

Champneys *against* Hamlin.

The stat 48 *G* 3. c. 149. sched 2. requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4*d* per sheet is imposed, and it not having been the practice to write such copies on both sides of the stamped sheet of paper; held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody.

Reader obtained a rule on the plaintiff to shew cause why the defendant should not be discharged out of custody for an irregularity in the proceeding against him, in regard to the stamps; and notice of it was directed by the Court to be given to the solicitor of the stamp office. The defendant was in custody, and the copy of the declaration delivered to him was upon two four-penny stamped sheets, which taken together did not contain a greater number of words than would have been covered by the two stamps; but *on the back* of one of the stamped sheets, the front of which had been used for the common money counts, was written a count on a promissory note, which altogether made a greater number of words on that sheet than the single stamp would cover, if the stamp were reckoned according to the number of words allowed in other cases. And this was now insisted upon as an objection by the *Attorney-General*, on behalf of the stamp office, who referred to the stat. 48 *Geo.* 3. *c.* 149. *schedule, part* 2., which first states that the duties on law proceed-

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1810.

CHAMPNEYS *against* HAMLAN.

ings are to be paid *for and in respect of every sheet of paper*, &c. upon which the several matters therein charged shall be respectively written or printed; except where the duties are imposed according to the number of words therein contained, or are expressly charged in any other manner. And that all the instruments, matters, and things, therein charged with a duty in respect of every sheet, &c. shall respectively be written *in such and the same manner and form* as the like instruments, matters, or things, *have been heretofore accustomed to be, or are now usually written or printed.* Then follows the alphabetical list of the different articles required to be stamped, with the value of the stamp: amongst others, "Declaration in any court of "law, 4*d*."—"Copy (i. e. office copy) of any declaration, "plea, &c. or other pleading whatsoever, in any court "of law, 4*d*." And he now produced an affidavit negativing that this office copy of the declaration was written in the usual and accustomed manner; and stating that it was the first known instance of such a copy written upon both sides of the paper. He observed that if this mode of using a stamped sheet were permitted, it would also cover words written across the original lines and in every direction upon the paper. That the stamp being imposed upon each separate sheet, it was no answer to the objection that one of the sheets was overloaded with words written in an unusual manner, to shew that the rest of the declaration was written upon another stamped sheet, which might have contained a greater number of words.

And of this opinion was *the Court* (after hearing *Park* against the rule). They said that if the copy of the declaration were not written upon the stamped sheet in the usual and accustomed manner practised before the making of the act, the party did not bring himself within the

1810.

CHAMPNEYS *against* HAMLIN.

provision referred to; and the defendant was entitled to be discharged out of custody for the non-delivery to him of a proper copy of the declaration in due time.

Rule absolute.

Tuesday, May 22d.

SHIFFNER *against* GORDON and MURPHY.

As the king cannot licence the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British* as well as *enemy*'s property in that manner, (the former of which is legalized by the stat. 43 *G.* 3. *c.* 153. *s.* 15, 16. and 45 *G.* 3. *c.* 34.) the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured; the assured not resisting their claim to that extent.

THIS action was brought to recover 328*l.* 6*s.* 11*d.* as the balance due to the plaintiff from the defendants for premiums of insurance upon certain policies on goods, which he had underwritten for them. The declaration contained a count for money due for premiums, and also the usual money counts; and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiff for 328*l.* 6*s.* 11*d.*, subject to the opinion of the Court upon the following case.

The plaintiff being an underwriter, and the defendants extensively engaged in the *Spanish* trade, between the latter end of 1804, and the middle of 1807, the plaintiff underwrote many policies effected by the defendants, the account of all which was settled in *October* 1807, when the plaintiff paid to the defendants a balance of 66*l.* 0*s.* 10*d.* Other policies were afterwards underwritten by the plaintiff for the defendants in 1807 and 1808, and on a balance of the accounts there remained due to the plaintiff 328*l.* 6*s.* 11*d.*, for which this action was brought. This balance consisted of the following sums, viz. 93*l.* 4*s.* 2*d.* undisputed premiums, and 235*l.* 2*s.* 9*d.* disputed premiums; the latter sum being upon the seven following policies; viz.

Ship *Liberty*, from *Cadiz* to *Vera Cruz*, 5th *August* 1807.

Herald, *Vera Cruz* to *London*, to touch at the *Havannah*, - 2d *October* 1807.

Neutrality,

SHIFFNER *against* GORDON and Another.

Neutrality, *Vera Cruz* to *Great Britain*, with liberty to touch at the *Havannah* - - 12th *Nov.* 1807.
Monticello, *Cadiz* to *South America*, 18th *Nov.* 1807.
Jupiter, *Cadiz* to *Vera Cruz*, 16th *Jan.* 1808.
Conception, *Cadiz to Vera Cruz*, 17th *Nov.* 1807.
Statira, *Vera Cruz* to *England*, with liberty to touch at the *Havannah* - - - 6th *Jan.* 1808.

All the above ſeven ſhips were neutral, being either *Americans* or *Danes*; and *Spain* and *England* were at war when the ſeveral voyages inſured commenced and ended. The cargoes on board the ſaid ſhips belonged partly to the defendants, and partly to their correſpondents reſident in *Old* and *New Spain*; the object of the voyages being to bring dollars, indigo, and other produce of *Spaniſh South America*, to *England*; and ſuch produce was brought accordingly. At the times when the plaintiff ſubſcribed theſe policies it was repreſented to him by the defendants' agents, who effected the inſurances on their account, that his majeſty's licences had been granted for the ſaid ſhips upon the voyages then about to be inſured, and that ſuch licences would cover hoſtile as well as *Britiſh* property; and upon the faith of ſuch repreſentation the policies were underwritten; and, in fact, his majeſty's licences for all the ſeven ſhips had been procured. The policies were in the common form, and did not contain any warranty for licences. The ſeveral licences were in this form: "*George* the Third, &c. To all commanders of our ſhips of war, &c.—Whereas we were graciouſly pleaſed by our royal licence, dated the 6th of *June* laſt, to permit Meſſrs. *Gordon* and *Murphy*, Meſſrs. *Read*, *Irvin* and company, and other *Britiſh* merchants, or their agents,

or

1810.

SHIFFNER against GORDON and Another.

or bearers of their bills of lading, on board one neutral vessel, the name of which they are unable to set forth, to export and convey from any port or ports of *Spain*, or from any of the *Canary Islands*, directly or circuitously to some *Spanish* port in *South America*, a cargo consisting of manufactured goods, with an assortment of quicksilver, paper, and cards of *Spanish* manufacture, wines, brandies, and all other innocent articles, as might be specified in their bills of lading; and in return for the said goods so to be exported to convey and import by the said vessel, from any of the *Spanish* ports in *South America*, directly or circuitously, to any of our colonies, islands, or plantations in the *West Indies*, or in *Europe*, or to any port of our United Kingdom, such quantity of the produce of the *Spanish* colonies and bullion as might be specified in their bills of lading, *and being their property or that of other* British *subjects, or the property of the subjects of any state at present in amity with us, and not being the property of our enemies;* and that the said vessel should proceed on her intended voyage without molestation by any of our ships of war or privateers, either on account of the existing war or of any other hostilities which might hereafter take place: and whereas it hath been represented to us, that the *Danish* ship *Neutrality*, *Habor Elisfen*, master, took the benefit of our said licence on a voyage from *Barcelona* to *Vera Cruz* and the *Havannah*, and to return to a port of our United Kingdom, and that the said voyage and adventure was undertaken after a communication with the lords commissioners of our treasury, and for the purpose of procuring a quantity of dollars, which were and still are necessary to our public service; and in the course of such communication it was fully understood that the cargo to be sent or brought back on board

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such vessel might be in part or in the whole *Spanish* property: and whereas by the terms of the said licence it has been required that the said cargo shall be *British* or neutral property: We taking into our consideration the premises, and the urgency of the public service in this behalf, are graciously pleased to grant our royal licence and protection for the said cargo and bullion, going or returning on board the said vessel, notwithstanding any thing contained in our order of the 7th of *Jan.* last to the contrary, and *notwithstanding the said cargo and bullion may appear to be and be* Spanish *property.* Provided, nevertheless, that the said vessel in her return voyage from the *Spanish* colonies shall proceed directly or circuitously to any of our colonial islands, plantations, or settlements in the *West Indies*, or in *Europe*, or to *Gibraltar*, or to any part of the United Kingdom, notwithstanding she may appear by her clearances to be destined to some other country; and upon condition that security shall be given by the said Messrs. *Gordon* and *Murphy*, to the satisfaction of the lords commissioners of our treasury, that in as far as may depend upon their bonâ fide endeavours, the quantity of dollars agreed upon shall within twelve months from the date hereof be brought from the *Spanish* colonies. Provided also, that the licence hereby granted shall remain in force 18 months from the date hereof. And we do hereby in all other respects confirm our licence hereinbefore recited: and we further direct and strictly enjoin the commanders of our ships of war and privateers not to molest or interrupt the said ship in the prosecution of her said voyage." Dated *St. James's*, 22d of *Jan.* 1807, and countersigned "*Spencer.*" The ship *Neutrality* was taken by a *British* privateer, and whilst in her possession was lost by the perils of the sea;

and

1810.

SHIFFNER *against* GORDON and Another.

and the plaintiff had refifted the payment of the lofs upon certain legal objections, which the Court had decided in his favour; though he had paid the defendants' loffes on other fhips in fimilar voyages. The defendants paid no money into court. And the queftion was, whether the plaintiff were entitled to recover the 328*l.* 6*s.* 11*d.* being the full amount of his demand, including the premiums upon the feven policies; or fuch part of the premiums only as was fufficient to cover the intereft *of the defendants* in the feveral cargoes thereby infured, befides the fum of 93*l.* 4*s.* 2*d.*, for which it was not difputed that the plaintiff was entitled to a verdict. If the Court were of opinion that the plaintiff was entitled to recover only fuch part of the premiums as would be fufficient to cover the intereft of the defendants in the cargoes infured by the feven policies, beyond the fum of 93*l.* 4*s.* 2*d.*, then the the amount of fuch intereft was to be afcertained by an arbitrator, and the verdict was to be reduced accordingly.

There was another caufe of *Vaughan* v. *Gordon and Murphy*, the circumftances of which were in fubftance the fame.

Carr, for the plaintiff, contended that he was entitled to recover the whole. It was objected at the trial that the policies were altogether void on the face of them; fome of them profeffing to cover voyages to and from the enemy's country, and others of them to cover importations of *Weft India* produce into this country in neutral fhips. As to the trading with the enemy, the objection is removed by the king's licence, as fettled in *Potts* v. *Bell* (*a*), and *Vandyck* v. *Whitmore* (*b*). But it may

(*a*) 8 *Term Rep.* 548. (*b*) 1 *Eaft*, 475.

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1810.

SHIFFNER against GORDON and Another.

be admitted, that so far as the king's licence exceeds what is warranted by the navigation laws, it is not valid. With respect, however, to *neutral* and *British* property, it appears from the stat. 43 *Geo.* 3. *c.* 153. *f.* 15 & 16. and 45 *Geo.* 3. *c.* 34. *f.* 1., that the legislature meant to relax the former strictness of the navigation code, and to authorize the king to grant licences of this description for the importation of such property from neutral or hostile countries. But the contract is equally good, though it do not notice such licence, if in fact it be granted. For in *Timson* v. *Merac* (*a*), a contract of guarantie by *British* subjects here, that a house in *France* would ship goods from thence in a neutral ship to be imported into this country, was held to be legal, and covered by such a licence which was afterwards granted to *British* merchants to import such goods on their own account: and the same objection might have been raised in almost every case of such licences which has been brought into controversity; but it does not appear to have been taken either at the bar or by the bench. It existed equally in *Vandyck* v. *Whitmore* (*b*), *Vanharthals* v. *Halbed* (*c*), and *Kensington* v. *Inglis* (*d*), as in this case. Besides, the defendants' counsel will not now dispute that the policies were valid upon the face of them at the time they were subscribed. [*Puller* contrà, being called upon by Lord *Ellenborough* C. J. to state whether he meant to admit their validity in form, said that he was not instructed to dispute it; that the licences

(*a*) 9 *East*, 35. (*b*) 1 *East*, 475. (*c*) Ib. 487. n.

(*d*) 8 *East*, 273. In this last case, the objection upon the breach of the colonial and navigation laws was taken on the part of the plaintiff in error in the course of the argument in this court; but the Court held that he was precluded from insisting upon it, inasmuch as that objection arose, if at all, out of the evidence, and he was confined to the objections taken to the evidence at the trial, and stated on the face of the bill of exceptions. Vide ib. 280, 1.

were

1809.

SHIFFNER against GORDON and Another.

were in fact granted before the policies were effected. But he meant to insist that the licences were only good to the extent of the king's power to grant them under the recent statutes, and only covered the goods of the subject to be imported, but not the goods of an enemy. On which his Lordship said, that upon this admission they would take the policies to be primâ facie valid.] It will then be objected that the policies (a), though not void on the face of them, were voidable and avoided by means of the assured's shipping on board hostile property as well as their own, which hostile property could not be imported in neutral vessels from *South America*, nor covered by an insurance. But as the contract was avoided by their own subsequent illegal act, they ought not to be permitted to avail themselves of it to withhold the premiums. He said that he should not contend that the late acts extended so far as to enable the king to license the importation of enemies' property; the Court having in a former case (b), arising out of the same transaction, intimated their opinion against it, though that point was not expressly decided; the Court having determined that case against the assured upon the ground of their noncompliance with the terms of the licence, by which alone the adventure could be legalized. [*Bayley* J. The assured agree to allow the whole premiums on the insurance from *Old* to *New Spain*: they only resist their liability

(a) This objection, it was said applied only to three of the ships, the *Neutrality*, *Statira*, and *Herald*, where the policies were upon the homeward-bound voyage.

(b) This was the case of *Gordon* v. *Vaughan*, in this court, *E.* 49 *G.* 3. which ultimately went off, on the ground suggested in the argument. The licence was to cover the voyage out and home, and contained a condition that the licensee should export a certain proportion of *British* manufactures for the voyage out: but it appeared that the greatest part of the outfit was made up of *Spanish* goods, and only a very small quantity, merely nominal, of *British* manufactures; which was deemed to be colorable and in fraud of the licence.

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to pay the premiums which covered the importation of enemies' property in neutral vessels: and if the underwriters were not bound upon the policies home, in respect of the *Spanish* property thereby insured, how can they claim the premium paid for the insurance of that property?] The underwriters did not know that enemies' property was put on board, and the assured having done this upon their own risk and responsibility, and thereby avoided the policies, the Court cannot apportion the premium.

Puller contrà, observed that there were two classes of voyages insured, the one from *Old Spain* to *South America*, the other from *South America* to *England*. That he did not mean to deny the king's authority to license the former; it being part of his prerogative to dispense with the jus belli in whole or in part: but by the navigation laws the king could not sanction the importation into this country of enemies' property, the produce of *South America*, in neutral ships. So much of the premiums, therefore, as covered that property must be deducted as for short interest. The amount of the interest insured on the home voyage is divisible into that part which covered the property of *British* subjects, and that which covered the enemies' property; considering that both parties acted innocently, though ignorantly; confiding in the supposed goodness of the licences to cover the whole; and therefore this does not fall within that class of cases (*a*) where the assured intending to insure an illegal voyage have been held not entitled to recover back the premium when paid on the one hand, nor the

(*a*) *March* v *Abell*, 3 *Bos & Pull.* 38. *Vandyck* v *Hewitt*, 1 *East*, 96. *Lowry* v. *Bourdieu*, *Dougl.* 163 465. *Andree* v. *Fletcher*, 3 *Term Rep* 266. and *Lubbock* v. *Potts*, 7 *East*, 456, were cited.

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1810.

SHIFFNER *against* GORDON and Another.

underwriter to ſue for it on the other. He was then ſtopped.

Lord ELLENBOROUGH C. J. It is a ſettled rule, that where a contract which is illegal remains to be executed, the Court will not aſſiſt either party in an action to recover for the non-execution of it. It is a very dangerous queſtion for the plaintiff to ſtir in this caſe, if we are puſhed to decide upon it, whether this were not one entire mixed cargo of *Britiſh* and enemies' property in each ſhip reſpectively covered by the ſeveral policies, on which the premium was not diviſible: but as the defendants' counſel has conſented to wave the queſtion, and to admit the plaintiff's right to recover ſo much of the premiums as covered the *Britiſh* riſk, it is unneceſſary to ſay more upon it. There can be no doubt in this caſe that part of the cargo of the ſeveral ſhips which was to have been imported into this country, being forbidden by the navigation laws, and which, therefore, the king's licence did not extend to cover, the underwriters upon the policies never run any riſk, at leaſt as to that part; and therefore there is no pretence to ſay that the plaintiff can recover the premiums for it.

The other Judges concurring, it was ſettled that the plaintiff ſhould recover the amount of the premiums on the *Britiſh* part of the inſurance, when aſcertained, on the three ſhips inſured on the homeward-bound voyage, and the whole of the premiums on the four outward-bound voyages.

DOE, on the several Demises of Sir ROBERT H. BROMLEY, Bart. and Others, *against* BETTISON and Others.

Tuesday, May 22d.

Under a power to lease for 21 years *reserving the best rent*, so as the lease should not contain any clause whereby authority should be *given* to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: held that a lease was good; though the lessor thereby took the repairs of the mansion-house (excepting the glass windows) on himself, and covenanted that if he did not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his (the lessor's) life at the request of the lessee, his executors, &c. on the same terms: because this covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man.

The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown.

IN ejectment brought to recover possession of a mansion house called *Owthorpe Hall*, with the appurtenances, and also two dwelling houses, &c. and 411 acres of land, in the county of *Nottingham*, the defendants, at the trial before *Le Blanc* J. at *Nottingham*, obtained a verdict, subject to the opinion of this Court on the following case.

The late Sir *George Bromley* was tenant for life, without impeachment of waste, of the premises, under his marriage settlement dated in *May* 1779; with a power of leasing by indenture (inter alia) the premises to any person, for any term of years not exceeding 21, absolute, to take effect in possession and not in reversion, *so as there was reserved in every such lease the best and most improved yearly rent* that could be reasonably gotten for the same, without any fine, &c.; and so as there was contained in every such lease a condition of re-entry for non-payment of the rent reserved; and so as in every such lease *there was not contained any clause whereby any power or authority should be* GIVEN *to any lessee to commit waste, or whereby any lessee should be exempted from punishment for committing waste;* and so as there was inserted in every such lease *such other conditions, covenants, and restrictions as are gene-*

1810.

Doe, Lessee of Bromley, against Bettison.

rally inserted in leases, according to the usage of the counties where the said premises so to be leased are situated; and so as the respective lessees executed counterparts of their respective leases.

By indenture of the 25th of *March* 1801, Sir *George Bromley* demised the premises in question to *J. Renshaw*, for 21 years, to commence from the 10th of *Oct.* preceding, at the annual rent of 230*l.* payable to Sir *George*, his heirs and assigns, and after him to those to whom the premises should descend or belong: with a proviso for re-entry by Sir *George*, his heirs and assigns, or such other person, &c. if the rent were in arrear for 20 days. There was also a clause against assigning the premises except to the lessee's wife and children by will, without consent in writing of the lessor, &c. The lease also contained a covenant by the lessee for payment of rent and taxes, &c. and to keep the dwellinghouses (except the mansionhouse), and all other out-buildings, and the gates, &c. on the lands, in tenantable repair during the term; the lessor, &c. allowing rough wood for such repairs; and that the lessee should keep in repair the glass of the windows in the mansion house, and should pay for the carriage of materials necessary for the repair of such mansion, not exceeding 12 miles distance. And Sir *George* covenanted for himself, his heirs and executors, &c., during the term, to keep in repair the mansion house (except the glass in the windows and the carriage of materials for repairs); and that *in case of repairs wanted on the roof* of the mansion house, *if Sir* George, *his heirs and assigns, did not repair* the same within 3 calendar months after notice in writing of the defect, it should be lawful for *J. Renshaw*, his executors and administrators, to repair the same, *and deduct and withhold the charges thereof out of the rent reserved and*

1810.

DOE, Lessee of BROMLEY, against BETTISON.

made payable to the said Sir Geo. B., *his heirs and assigns.* The lease also, after reciting that the demised premises were greatly out of repair when the lessee first entered, so that it would cost him at least 1000*l.* to put the same in repair, and that it was agreed that he should expend that sum accordingly in the repairs; and that in consideration thereof Sir *George Bromley* should every year thenceforward *during his life* at the request and charge of *J. Renshaw*, his executors, &c. execute to him and and them a new lease of the premises, for 21 years, to commence on the 10th of *Oct.* preceding, upon the same rents, conditions, covenants, and provisos, as in this lease: and reciting that Sir *George Bromley* was fully satisfied, by the estimate and opinions of skilful persons, that the lessee had expended 1000*l.* and upwards in the repairs: witnessed that in consideration of the premises, Sir *George* covenanted, at all times *during his life*, at the request and charge of *J. Renshaw*, his executors and administrators, to renew the lease for 21 years from the 10th of *Oct.* &c. upon and subject to the same rents, covenants, clauses, conditions, and provisos as in the present lease contained.

The case then found that the rent reserved was the full value of the premises at the time of the demise, and was the best and most approved yearly rent that could be reasonably gotten for the same: that the lease contained such conditions, covenants, and restrictions, as are generally inserted in leases, according to the usage of the county of *Nottingham*: that a counterpart of the lease was executed: and that there had been no breach of any of the covenants contained in it. That there is a large farm-house with outbuildings, and two dwelling houses or cottages on the premises, besides the capital mansion

1810.

Doe, Lessee of Bromley, against Bettison.

house called *Owthorpe Hall*, which was described to be very large, and that only a part of it was occupied by the lessee. If the plaintiff were entitled to recover, the verdict was to be entered for him: otherwise, the verdict for the defendants was to stand.

Copley, for the plaintiff, took three objections to the lease as not authorized by the power; first, that it contained a clause by which in effect the lessee is exempted from punishment for permissive waste in the mansion house. 2dly, That the lessee is exempted from the payment of rent to the extent of the money laid out by him in the repair of the roof, upon default of such repairs made by the lessor tenant for life. 3dly, That there is a covenant by the tenant for life for renewal, which is prejudicial to the remainder-man, and avoids the lease. As to the first, the power must be taken to refer to *permissive* as well as *commissive* waste, by analogy to the statute of *Marlbridge* as explained by Lord *Coke*'s comment (*a*) on the word *faciant* in that statute, and in the statute of *Gloucester*, *c.* 5. [*Bayley* J. The restriction on the power of leasing here is only that the lease shall not contain any clause whereby any power shall be *given* to the lessee to commit waste, or exempting him from punishment for committing it.] The power must be construed strictly according to the legal sense of the words: and if any part of the demised premises are to be repaired by the lessor, so far it operates to give an exemption to the lessee from the punishment of permissive waste. [*Le Blanc* J.--Does not the argument come at last to the quantum or sufficiency of the rent reserved? If the tenant be to keep the premises in repair, the rent is so

(*a*) 2 *Inst.* 145.

much

1810.

Doe, Lessee of Bromley, against Battison.

much less: if the landlord be to repair, the rent is the greater. It was a question for the jury at the trial, whether, taking into consideration the repairs to be made by the landlord, the rent reserved were the fair rent.] 2dly, At any rate the covenant enabling the lessee to deduct the charges which he should incur, by reason of the non-repair by the landlord, out of the rent, amounts to a cesser of the rent pro tanto, and is an unusual covenant contrary to the power. As in *Doe* v. *Sandham* (a), a power to lease, reserving the usual covenants, was held not to warrant a lease containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease. [*Bayley* J. That was found in fact by the jury to be an unusual covenant.] 3dly, The covenant for renewal avoids the lease: it operates indirectly upon the interest of the remainder-man, though it only binds the tenant for life directly. The lessee would not of course apply for a renewal unless it was for his benefit; and the remainder-man loses one of the checks which in general operates in his favour on the tenant for life to reserve the best rent: for the tenant for life may for fear of an action on the covenant be induced to renew at less than the best rent at the time when such renewal is applied for: and the difficulty upon the remainder-man of proving that a better might then have been had is enhanced in a greater degree when other uncertain computations are to be taken into the account, than if the question were confined to the mere amount of the gross rent reserved.

Reader contrà was stopped by the Court.

(a) 1 *Term Rep.* 705.

1810.

Doe, Lessee of Bromley, against Bettison.

Lord Ellenborough C. J. The third is the only objection on which any argument could be raised. As to the first, the power stipulates against any clause in the lease whereby any authority shall be *given* to the lessee to commit waste, &c.: and the answer to that objection is, that no such power or authority is *given* to the lessee; nor is he thereby exempted from the punishment for committing waste: for the burthen of repair in the mansion house is thrown by the lease on the landlord; and it was incumbent on the plaintiff's counsel to have shewn that, according to the terms of the power, no such burthen could have been thrown on the landlord: but that is not prohibited, and therefore the argument falls to the ground. Next, the covenant provides that if repair should be wanted on the roof of the mansion, which the landlord took upon himself, and he did not repair it, the tenant might make the repair, and deduct the charge out of the rent reserved to the lessor. What objection can there be to provide for setting off the one demand against the other? Then as to the covenant for renewal; it is said that it has a tendency to induce the lessor to run the question on the quantum of rent reserved very closely; for if he renewed at the end of twenty years from the first granting of the lease, the remainder-man might have a lease fixed on him for 21 years from that time, reserving less than the best rent which could then have been reserved: but the answer is, that if the fact were so, the lease would be void, and the remainder-man might bring his ejectment and recover the premises.

Per Curiam. Postea to the Defendant.

BARLOW *against* M'INTOSH.

Tuesday, May 22d.

THIS was an action on a valued policy of insurance on coffee, on board the ship *Fortwyn*, at and from *London* to any port between *Dunkirk* and the *Weser*, at 30 guineas per cent. The interest was alleged to be in *F. W. Schmaling*, and the loss was averred to be by seizure and detention. At the trial before Ld. *Ellenborough* C. J. at *Guildhall*, the defendant's subscription to the policy, the shipment of the goods insured, and the interest and loss, as alleged, were proved; but the plaintiff was nonsuited, on an objection taken to the licence under which the voyage was prosecuted: and a rule nisi having been obtained for setting aside the nonsuit, it was afterwards agreed, upon the suggestion of the Court, to state the facts in the form of a case, which now came on to be argued.

Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, seeks to protect the adventure under the king's licence to trade with the enemy, it is not sufficient to give in evidence at the trial and to prove his possession in fact before the voyage commenced of a *general* licence, dated three months before, licensing *six neutral vessels* under certain neutral flags to pass unmolested *to or from any port of* Holland, *from or to any port of this kingdom*, with certain goods (including the goods insured;) which licence was directed to *R. S. and other British merchants*; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom, without also giving probable evidence to account for his possession of the licence, and to shew that his user of it was lawful; as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence.

The *Fortwyn*, on board of which the coffee was loaded, was a neutral vessel sailing under a *Kniphausen* flag; and having departed from *London* on the 1st *Nov.* 1807, was seized by the *Dutch* government in the river *Maas* on the 6th of the same month, while proceeding to *Rotterdam*, her port of destination. The captain of the *Fortwyn* produced at the trial an original licence which he received from Mr. *Schmaling*, a merchant in *London*, the shipper of the goods in question, previous to her sailing on the voyage insured; and which licence was on board the ship during the whole voyage, and at the time of the

1810.

BARLOW against M'INTOSH.

feizure of the cargo in the river *Maas*. The licence was in the form following.

" *G. R.*

" *George* the Third, &c. To all commanders of " our fhips of war, &c. Our will and pleafure is that " you permit fix neutral veffels to navigate freely and " without moleftation, under *Hambrô*, *Bremen*, *Olden-* " *burgh*, *Roftocker*, *Danifh*, *Pruffian*, *American*, *Pappen-* " *burgh*, or *Kniphaufen* flags, from or to any port of *Hol-* " *land*, with liberty to touch at *Tonninghen* or fome other " neutral port, to or from any port of our United King- " dom into which neutral veffels may be allowed to enter " from *Holland*; and to import, &c. [here followed " a long lift of articles importable]; and alfo to export " [here followed another lift of articles exportable, in- " cluding coffee,] and all other articles not prohibited by " law to be exported, as may be fpecified in their bills of " lading. This our licence to remain in force for fix " months from the date hereof, and no longer, and to be " revocable at any time during the faid period at our " pleafure: but in cafe of its not being fo revoked, the " faid veffel, mafter, and crew, to have liberty to depart " unmolefted to any port not blockaded. Provided alfo " that Richard Smith *and other* Britifh *merchants*, to " whom we may grant this licence, do caufe the fame to " be delivered up to them or their agents whenever the " fhip or veffel fhall enter any of our ports, and in de- " fault thereof the faid fhip or veffel to lofe the protec- " tion thereby granted. Given at our court at *St. James's*, " 22d day of *July* 1807, in the 47th year of our reign. " By his majefty's command, *Hawkefbury*."

" *Richard Smith* et al. licence.

No

No other evidence was given to connect Mr. *Schmaling* with *Richard Smith* in the licence mentioned, or to shew that he was one of the merchants for whom the licence was intended, or to explain by what means he became possessed of it. If the plaintiff were entitled to recover, the nonsuit was to be set aside, and judgment entered for the plaintiff, (but without costs:) or otherwise, the nonsuit was to stand.

Puller, for the plaintiff, contended that the possession of the licence by a *British* merchant, as Mr. *Schmaling* was, was primâ facie evidence that he was legally entitled to hold and use it; the licence being in terms granted "to *Richard Smith and other* British *merchants*," subject, as such primâ facie evidence must necessarily be, to be rebutted by shewing that Mr. *Schmaling* unlawfully obtained the possession or made an unlawful use of it. The general form of the licences, which neither specify the name of the ship or of the shipper of the goods, was introduced for the very purpose of concealing both from the knowledge of the enemy; and the practice has been to take them out in the names of certain known ship-brokers, who have notoriously no interest in either; but the *British* merchants really interested in the adventures are designated under the general term of "*other* British *merchants*." Provided, therefore, they are retained in the hands of any *British* merchants, the policy of government is answered, and it must be a matter of indifference by whom individually they are used, if used properly. It might be difficult in many instances to prove the connexion between the general broker, whose name is used pro formâ, and the particular merchant for whom the licence is taken out; the communication between them

1810.

BARLOW *against* M'INTOSH.

may have been perſonal, and the broker may have died in the mean time. The inconvenience, if any, in theſe caſes, ariſes from the very nature of the thing and its profeſſed object of concealing the individuality of the tranſaction, and that muſt neceſſarily let in the generality of the evidence founded upon the mere fact of the poſſeſſion of the licence. He referred to *Deffis* v. *Parry* (*a*), and *Timſon* v. *Merac* (*b*), as caſes which turned on the generality of theſe trading licences, which had received a liberal conſtruction in furtherance of the trading intereſts of the country meant to be facilitated by them.

But *the Court* obſerved that in the latter of theſe caſes the licence was granted in the name of *Merac* and Co. who were ſued upon their guarantie of the contract for the importation of the goods under the licence; and in the other caſe the importers of the goods under the licence were proved to have acted in connexion with the perſons to whom the licence was granted: and therefore thoſe tranſactions were quite in the regular courſe. *Le Blanc* J. further obſerved, that the licence in this caſe did not appear by any evidence to have been in the ſhipper's hands till above three months after the date of it, when it was given by him to the captain.

And Lord ELLENBOROUGH C. J. ſaid that previous to the time when the licence was proved to have been in the poſſeſſion of *Schmaling*, and to have been by him delivered to the captain, it might have ſerved for three voyages to *Holland*. It might have dropped out of the pocket of the perſon entitled to it, and been found by the preſent poſſeſſor of it. The poſſibility of ſuch facts ex-

(*a*) 3 *Boſ & Pull.* 3. (*b*) 9 *Eaſt*, 35.

iſting

isting, consistently with the evidence given at the trial, called upon the shipper of the goods, who endeavours to avail himself of it, to connect himself by other evidence than the mere possession with the particular licence: otherwise, in the absence of all proof of such connexion, there was a natural suspicion, a preponderance of probability, that the licence had been used before to cover an antecedent voyage, and against the lawful use of it upon the voyage in question. The state of the commercial world may make it expedient to grant licences in this very general form; but this generality subjects the practice to abuse. If the party who produces and seeks to avail himself of it be required to shew when and how he obtained the possession of it, that will be a salutary check upon the abuse of it. I did not require the assured at the trial to shew that he was the person who obtained the licence from the privy council office: I am aware of the difficulties which may exist in disclosing the names of the real parties to the adventure and the adventure itself: but he might have shewn that he obtained possession of it lawfully from the person by whom it was taken out. But if it be sufficient for a party at any time to stand upon his mere possession of such a general licence, there can be no check whatever upon any indefinite abuse of them. [*Puller* having afterwards mentioned from recollection a case of *Horseman* v. *Bristow*, which was tried before his Lordship; in which the possession of a similar licence by the party claiming the benefit of it was deemed sufficient: and having suggested that it was a question in all cases for the jury to decide, whether the party obtained the possession of the licence lawfully:] his Lordship added, that he had no recollection of the case alluded to, nor did he recognize any such decision. It might

1810.

BARLOW against M'INTOSH.

might have passed upon admissions, when his attention would not be called to it. That if the question of possession were presented under different circumstances which served to explain and shew it to be lawful, the case did not apply to the present: If the circumstances were alike, the attention of the Court being now first called to the question, it must be considered as sub judice. As to its being a question for the jury, whether the mere fact of possession shewed a lawful possession of the licence; it makes part of the title of the party claiming to be licensed to shew how he obtained possession of a licence which in the terms of it is general: It makes part of the plaintiff's case against the underwriter to connect himself with the property insured, and to shew that it was lawfully insured: If he obtained possession of it properly, he can have no difficulty in shewing from whom and when he obtained it. The plaintiff will not be concluded by this nonsuit from bringing forward his claim again upon better evidence, if he have a fair case. Probable evidence of a lawful possession will exclude any unfavourable presumption from the circumstance of standing upon the mere possession of such an instrument wholly unaccounted for.

LE BLANC J. This general licence is merely intended to protect the ship from the seizure of *British* cruizers, and to suffer her to pass: but when any individual seeks to cover his own interests under it, he must connect himself with it by some probable evidence.

BAYLEY J. A general licence must be applied by evidence to the particular case in judgment.

Per Curiam, Judgment of nonsuit.

Scarlett

Scarlett was to have argued for the defendant, and observed shortly that it could never have been the intention of the Crown, in granting these general licences, to enable the persons on whose application they were issued to grant them out to whom they pleased.

1810. BARLOW *against* M'INTOSH.

JACAUD and GORDON *against* FRENCH, BORROWES, and CANNING.

Tuesday, May 22d.

A being partner with *B* in one mercantile house, and with *C.* in another; the house of *A.* and *B* indorse a bill of exchange to the house of *A* and *C*; after which *B.*, acting for the house of *A* and *B*, receives securities to a large amount from the drawer of the bill, upon an agreement by *B*, that the bill should be taken up and liquidated by *B.*'s house, and if not paid by the acceptors when due should be returned to the drawer. Held that the securities being paid and the money received by *B* in satisfaction of the bill, *A.* was bound by this act of his partner *B.*, whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of *A.* and *B*, but also individually in other respects; and therefore that he could not in conjunction with *C*, his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with *B.* in discharge of the same.

THE plaintiffs declared in assumpsit for the amount of a bill of exchange, dated *Dublin*, 7th of *April* 1806, drawn by *Farrell* and Co. upon, and accepted by, the defendants in *London*, for 1000*l.* sterling, payable 45 days after date, to the order of *Farrell* and Co., and indorsed by them to *Blair* and *Jacaud* of *Dublin*, and by *Blair* and *Jacaud* indorsed to the plaintiffs. At the trial before Ld. *Ellenborough* C. J. in *London*, a verdict was found for the plaintiffs for 1198*l.* 10*s.*, subject to the opinion of the Court on the following case.

The plaintiff *Jacaud* was a partner in business with *Blair* in *Dublin*, in *April* 1806, and for some time before, and until after the time of providing for the payment of the bill in question by *Farrell* and Co. The business was carried on in the firm of *Blair* and *Jacaud*, and was a distinct firm from that of the plaintiffs carried on under the names of *Jacaud* and *Gordon* in *London*. The firm of *Jacaud* and *Gordon* shipped goods, effected insurances, and accepted bills for, and transacted other the

affairs

1810.

Jacaud against French and Others.

affairs of, the firm of *Blair* and *Jacaud*, and the firm of *Blair* and *Jacaud* from time to time made remittances to the firm of *Jacaud* and *Gordon* of *London*, to cover or anſwer their advances and acceptances. On the 7th of *April* 1806 *Blair* took or bought from *Farrell* of *Dublin* the ſaid bill of exchange, and on the ſame day the houſe of *Blair* and *Jacaud* indorſed the bill, and remitted it to the plaintiffs on account of *Blair* and *Jacaud*; at which time the plaintiffs were under acceptances for *Blair* and *Jacaud* to the amount of about 3000*l.* On the 15th, 16th, and 23d days of *May* 1806, before the ſaid bill fell due, *Farrell lodged with and paid to the houſe of* Blair *and* Jacaud *two notes* of one *R. O'Conner* for 695*l. Iriſh* currency, and alſo the acceptances and notes of *Farrell* and Co. for 880*l. Iriſh, for the expreſs and ſpecific purpoſe of liquidating and providing in the firſt place thereout, for the due payment of the ſaid bill of exchange, and to take up and ſatisfy the ſame,* and for in part liquidating another bill drawn by *Farrell* and Co. on the defendants' houſe for 1000*l.*, alſo purchaſed by the houſe of *Blair* and *Jacaud* from *Farrell* and Co. *It was agreed and underſtood between* Blair *on the part of the houſe of* Blair *and* Jacaud, *and* Farrell *and Co., that in caſe the ſaid bill ſhould not be paid when due, it ſhould be returned and delivered up to* Farrell *and Co.* Immediately on the ſaid notes and bills being ſo paid by *Farrell* and Co. to the firm of *Blair* and *Jacaud*, (viz.) on the 15th, 16th, and 23d of *May* 1806, ſuch notes and bills were entered in the uſual way in the books of account of the houſe of *Blair* and *Jacaud*, and were immediately credited therein to the account of *Farrell* and Co.; which books were at that time under *Jacaud's* care in the houſe where he reſided, and he was in the conſtant habit of inſpecting the ſame. The houſe of

Blair

Blair and *Jacaud* applied to their own use the notes and acceptances so received from *Farrell* and Co., and did not remit the same or any part thereof to the house of *Jacaud* and *Gordon*, nor did they take up the bill of exchange now sued upon, or provide for the same, or give any notice to the house of *Jacaud* and *Gordon* of the deposit or payment so made by *Farrell* and Co. On the 15th of *May* 1806, the day on which *Farrell* and Co. made the first payment as aforesaid to the firm of *Blair* and *Jacaud*, the firm of *Blair* and *Jacaud* sent a letter to the firm of *Jacaud* and *Gordon* in *London*, dated—*Dublin*, 15th *May* 1806—in which they say, "In consequence of a communication had this day with the drawers of the bills on Messrs. *Bogle*, *French*, and Co., we intend remitting Messrs. *Andre* and Son to-morrow, against the 1000*l*. falling due on *Monday*, and we will then let the bill remain in their hands, to the end that they may conform to whatever is determined on for the liquidation of those gentlemen's affairs. We thought it proper to make this communication to you: it will be done to-morrow: and in a day or two, you shall be apprized of what is intended regarding the other 1000*l*., that is, whether it will be done in the same way or by some other house appointed for the purpose, &c. This arrangement of paying *Bogle*, *French*, and Co.'s bill we suppose will be very acceptable to Mr. *Andre*; as, besides being remitted against the bill, it will be remaining in his hands; and though a dead letter, will be a certain security." The house of *Blair* and *Jacaud*, on the 27th of *May* 1806, wrote from *Dublin* to the house of *Jacaud* and *Gordon* in *London* another letter, in which they state—"As yet we have not received any abstract from Messrs. *Andre* and Son, who, not knowing, paid Messrs. *Thompsons'* bills due

1810.

JACAUD *against* FRENCH and Others.

due last month, are now more than covered for the payments of this month. Since our last we remitted them 650*l.* and it being now ascertained that Messrs. *French* and Co. will pay in full and at no distant period, we have requested Messrs. *Andre* to draw on us for 1000*l.* holding Messrs. *Farrell* and Co.'s acceptance, to the end that we would not have that sum locked up at this moment, which we do not foresee they can have any objection to; and if the other 1000*l.* is not returned, we have to beg of you to see Mr. *Canning* himself, who will arrange with another house in *London*, on account of the drawers of said bill, to have it returned. This we understand is arranged between Mr. *Canning* and the drawers; and a Mr. *Metcalfe* of the *London* house, whom we have not seen, but who left this for *London* yesterday, has had conversations with the drawers on the same subject." These letters were in the hand writing of *Blair*. When the letter of the 15th of *May* 1806 was written by the firm of *Blair* and *Jacaud*, that firm had received from *Farrell* and Co. part of the acceptance and notes before mentioned to have been handed to the firm of *Blair* and *Jacaud*; and when the letter of the 27th of *May* 1806 was sent by the firm of *Blair* and *Jacaud* the whole of the acceptances and notes so lodged by *Farrell* and Co. were received by the firm of *Blair* and *Jacaud* to be applied in payment of the bill now sued upon, and in part payment of the other bill of exchange in the hands of *Andre* and Son. The reason why *Blair* and the firm of *Blair* and *Jacaud* concealed the fact of the lodgement and receipt of the said bills and notes by *Farrell* and Co. proceeded from the firm of *Blair* and *Jacaud* being then under pecuniary difficulties, but which difficulties *Blair* and the firm of *Blair* and *Jacaud*, being confident they should

ſhould ſurmount, that firm was induced to conceal the fact, and thereby enable itſelf to apply the notes and acceptances to the object of extricating itſelf from ſuch its then difficulties. The defendant *Canning*, in anſwer to a letter written to him by the plaintiff *Gordon* on the 8th of *June* 1808, requeſting payment to the amount of the bill in queſtion, wrote to the plaintiff *Gordon* as follows: "*London*, 8th *June* 1808. Mr. *Canning* preſents "his compliments to Mr. *Gordon*, and in reply to his "note of this date ſhall be happy to ſee him on the ſub- "ject of it in the preſence of Mr. *French*, either on *Fri-* "*day* or *Saturday* next, if it is agreeable to call in *Broad-* "*ſtreet*; but Mr *Canning* does not think that the ſtate "of the affairs of the late firm of *Bogle*, *French*, and Co. "will admit of a payment of the bill alluded to being "made within the period mentioned in Mr. *Gordon*'s "note." If, under theſe circumſtances, the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to ſtand: if not, a nonſuit was to be entered.

Richardſon, for the plaintiffs, argued that the bill of exchange in queſtion, (which having been drawn by *Farrell* and Co. to their own order, and by them indorſed to the houſe of *Blair* and *Jacaud* of *Dublin*, was by the latter indorſed to the plaintiffs *Jacaud* and *Gordon* of *London*, the ſame *Jacaud* being a partner in both houſes,) was not ſatisfied againſt the plaintiffs, the bonâ fide holders now and at the time of the tranſaction, by the agreement made and executed between *Farrell* and Co. the drawers and the houſe of *Blair* and *Jacaud* in *Dublin*, in ſatisfaction of that bill: and this, notwithſtanding

that *Jacaud*, the partner of and co-plaintiff with *Gordon*, was alſo the partner of *Blair*, by whom the agreement with *Farrell* and Co. was in fact made; it in no way appearing that *Jacaud*, whatever opportunity of information he might have had, did in fact know of that arrangement; and no communication of ſuch an arrangement having ever been made to the plaintiffs' houſe of *Jacaud* and *Gordon*, or their conſent to it obtained. And though it muſt be admitted that the acts of or notice to one partner will, with regard to third perſons, bind another, though unknown to that other; yet that is only ſo far as the partnerſhip concerns are affected, and does not extend to bind the ignorant partner in other concerns dehors that partnerſhip, and much leſs ought it to be carried to the extent of binding other innocent perſons who may happen to be engaged with the partner ſo impliedly bound in diſconnected concerns. [Ld. *Ellenborough* C. J. It would not be ſo for criminal purpoſes; but for all civil purpoſes muſt not *Blair*'s knowledge and acts be taken to be *Jacaud*'s knowledge and acts?] The one firm has an intereſt as well as a name eſſentially diſtinct from the other, though the ſame individual is one of the partners in both. And though that circumſtance might prevent the one firm from maintaining an action at law, or ſetting off a debt, againſt the other, yet that proceeds upon mere technical rules peculiar to the laws of this country. But with reſpect to payments and dealings with third perſons, there is no ſuch technical rule, nor any caſe, which precludes the Court from conſidering the two firms ſo compoſed, ſuch as they really are, entirely diſtinct in intereſt and in name.

Lord

Lord ELLENBOROUGH C. J. It is impoffible to fever the individuality of the perfon. *Jacaud*, being a partner with *Blair*, muft be confidered as having together with *Blair* received money from the drawers to take up this very bill. How then can he, becaufe he is alfo a partner with *Gordon* in another houfe, be permitted to contravene his own act, and fue upon this bill which has been already fatisfied as to him. If *A.* and *B.*, partners, receive money to apply to a particular purpofe, *A.* and *C.* in another partnerfhip could never be permitted to contravene the receipt of it for that purpofe and apply it to another. His Lordfhip afked whether this point had not lately come before the Court in a former cafe? (a)

GROSE J. agreed that the action could not be maintained.

LE BLANC J. referred to *Bolton* v. *Puller*, 1 *Bof.* & *Pull.* 539.

BAYLEY J. *Jacaud* is not to be confidered as a bonâ fide holder of this bill, becaufe he has in effect, by the act of his partner *Blair*, received money for the purpofe of taking it up, which ought to have been fo applied.

Poftea to the Defendants.

Tindal was to have argued for the defendants.

(a) Qu. fed vide *Swan and Others* v. *Steele and Others*, 7 *Eaft*, 210.

Wednesday, May 23d.

The KING *against* Sir A. MACDONALD, and Others, Devisees in Trust under the Will of the late Duke of BRIDGWATER.

An act of parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rochdale* canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation; held that a poor's rate on his trustees, occupiers of the "*Rochdale canal "lock, tunnel, "dues, or rates,*" (which *dues* or *rates* are only other names for the *lock* rates therewith) is good, though the trustees were found not to be *inhabitants* of the township for which the rate was made.

Though the Sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated; yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stocks, by which they could amend a rate which omitted them, that concludes the question.

THIS was an appeal against a poor's rate made for the township of *Manchester*, which was confirmed by the Sessions on appeal, subject to the opinion of this Court on the following case.

The property in respect of which the appeal was made was described in the assessment as follows.

	Premises.	Assessment. £. s. d.	Poor's Rate. £. s. d.
Sir Archibald Macdonald (and others), Trustees of the late Duke of Bridgewater.	Rochdale Canal Lock, Tunnel, Dues or Rates,	562 10 0	140 12 6
	Warehouse and Wharf, Bottom of Castle Field,	525 0 0	131 5 0
	Staffordshire Warehouse,	262 10 0	65 12 6
	Warehouse on Manchester Side of Knott Mill,	375 0 0	93 15 0
	CoalWharf from Staffordshire Warehouse to Knott Mill.	90 0 0	22 10 0
	Wharf adjoining Knott Mill,	45 0 0	11 5 0
		1860 0 0	465 0 0

The

The appellants were not, at the time of making the asseſſment, *inhabitants* of *Mancheſter*, but were then and ſtill are entitled to and in the receipt of the tonnage, in reſpect of veſſels paſſing through the lock built upon the *Rochdale* canal, under an act of the 34th *Geo.* 3. the 2d ſection of which; reciting that "Whereas *Francis* Duke "of *Bridgewater* hath expended a conſiderable ſum in "making wharfs, for the convenience of the public, ad- "joining or near to his canal at *Mancheſter*, and when "the propoſed junction is made with his canal the pro- "fits ariſing from thoſe wharfs will be conſiderably di- "miniſhed; nevertheleſs he conſents to ſuch junction on "being authoriſed to build a lock upon the *Rochdale* canal "near the junction, and to collect certain rates herein- "after mentioned, as a compenſation for ſuch diminution "in the profits of his wharfage;" authorizes the Duke his heirs and aſſigns, "at his and their own expence, to "build a proper lock upon the ſaid *Rochdale* canal, at or "near *Caſtle Field*, &c. and all neceſſary works thereto "belonging; and to take at the ſaid lock for his and "their own benefit (as a compenſation for the diminution "in the profits of his wharfage as aforeſaid), the follow- "ing rates, viz." (and then it gives certain rates per ton for goods carried and navigated from the *Rochdale* canal into the canal belonging to the Duke, and vice verſa); "which rates ſhall be payable and paid at or near the "ſaid lock to the ſaid duke, his heirs and aſſigns, and "ſhall be collected by ſuch perſon as the ſaid duke, "&c. ſhall by writing, &c. appoint to receive the ſame." The lock was built in purſuance of the act. The tonnage amounts to as much as it is charged at in the aſſeſſment. The appellants, at the time of making the aſſeſſment, were and ſtill are in the occupation of the lock

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1810.

The King *against* Sir A. Macdonald and Others.

and of the several warehouses and wharfs mentioned therein; and the same are of the value assessed. The case then set forth the names of several individuals on whom notices of appeal were served, who were at the time of making the assessment, and still are, inhabitants of *Manchester*, and were then, and still are, respectively possessed of visible stocks in trade in that township; and were then personally liable to be assessed to the relief of the poor in respect thereof, if by law such property be liable to be rated in such assessment: but that neither of those individuals were rated in respect of their said stocks in trade or other personal property; neither were any inhabitants of *Manchester* or other persons rated in respect of their personal property in the township, although personal property was immemorially rated in that township down to the year 1796, and occasionally collected up to that time; but this merely at nominal sums, having no relation to the actual value of the property; and from thence rated (but not collected) down to the year 1807; from which latter period personal property had not at all been rated in the township. The proprietors of the *Rochdale* canal company are not rated for their locks upon the said canal situated within the township, or for the tonnage, tolls, duties, or rates, arising from such locks, or otherwise from the said canal within *Manchester*; this being provided for by the stat. 47 *Geo.* 3, entitled An act to to alter and amend the several acts for making and maintaining the *Rochdale* canal navigation. The case also stated the names of other persons, who, at the time of making the assessment, were, and still are, owners of annual chief or ground rents; one to the amount of 100*l.* and 50*l.*, another of 22*l* 7*s.* 6*d.*, another of 72*l.* 1*s.* 8*d.* and another of 10*l.* issuing and payable from lands and buildings

buildings in *Manchester*, in the possession of their several tenants; all which owners of quit or ground rents were then, and still are, inhabitants of the township, but are not rated in respect of such rents; nor is any person assessed in respect of rents issuing out of lands and tenements in the township: but the counsel for the appellants made no point upon the subject of the quit rents. In addition to the proof already given, the appellants gave further evidence of the amount of the clear surplus of stock in trade or other personal property, in the instances of the several persons contained in the notice of appeal; and called two witnesses to give this proof in the cases of two of the persons named: but the Justices not being satisfied, from the evidence offered, that there was any sum of surplus by which they could amend the rate, by adding the names of the persons in respect of whom such further evidence was given, confirmed the rate.

Park, *Dampier*, *Scarlett*, and *Yates*, in support of the rate, said that it could not be questioned but that the Duke of *Bridgewater*'s trustees were properly rateable for the several descriptions of property for which they were assessed. It will not be disputed that they are liable for the wharfs and warehouses: and they are equally within the principle of all the cases, including those recently decided, liable to be rated for the *Rochdale* canal lock, which is in its nature real property, yielding profit within the township; the rates leviable there by virtue of the act having been given to the duke in lieu of the profits arising from certain wharfs which he before enjoyed; and the case finding that the trustees are the occupiers of that lock. Then, as to the objection founded on the omission to rate the several persons stated in the case for

1810.

The KING against Sir A. MAC-DONALD and Others.

their ſtock in trade, it is not ſufficient that property is local and viſible within the townſhip in order to be rated, if it do not yield profit; and there being no evidence brought by the appellants which ſatisfied the juſtices that there was any clear ſurplus by which they could amend the rate in the caſe of any individual, according to the power given in ſuch caſes by the ſtat. 41 *Geo.* 3. *c.* 23. *ſ.* 6., they were bound by *The King* v. *Durſley* (*a*) to diſallow the objection. As to quit rents, they have been held not to be rateable (*b*).

The Attorney-General, Topping, and *J. Williams,* contrà, contended, firſt, that this was in effect a rate upon the *dues* or *rates* payable at the lock, and not a rate upon the lock itſelf: but it is ſufficient to raiſe the objection, that they are all coupled together, if part of the ſubject matter be not rateable: and the Court having recently decided that tolls in themſelves are not rateable, the truſtees, who are found not to have been inhabitants of the townſhip at the time, cannot be rated for them. Upon the ground of the omiſſion to rate the viſible ſtock in trade of the inhabitants of *Mancheſter,* they argued ſhortly upon the unreaſonableneſs of the concluſion drawn by the ſeſſions. The only evidence which can be given of the ſurplus profit made by the tradeſman, from the poſſeſſion of his ſtock in trade, muſt in its nature be general, ariſing from the nature and appearance of his dealings.

Lord ELLENBOROUGH C. J. The Court will not involve themſelves in any contradiction to the caſes which have

(*a*) 6 *Term Rep.* 53

(*b*) *Rex* v *Vandewall,* 2 *Burr* 991. This exemption was ſaid by Lord *Kenyon* in *Rex* v. *Albenbury,* 1 *Eaſt,* 535. to go upon the objection of its being a double rating of the ſame property, in the hands of the landlord, as well as of the tenant.

have been decided, by difcharging the rule for quafhing the order of feffions in this cafe. Firft, as to the omiffion of rating ftock in trade in *Manchefter*. In order to include particular individuals in the rate, a cafe muft be made out in evidence againft thofe individuals: here there was an attempt to do it by the appellants, but they failed in fatisfying the Court below upon the facts. We have no concern with the conclufion of fact which the Juftices have drawn as they ftate to us; and I do not fay that I fhould have come to the fame conclufion: but the Juftices have only found that certain perfons, inhabitants of *Manchefter*, were poffeffed at the time of vifible ftocks in trade within the townfhip, and were perfonally liable to be affeffed to the poor's rate in refpect thereof, if by law fuch property be liable to be rated. Now vifible property in the place, fuch as ftock in trade, merely as being *vifible*, is not liable to be rated, but to make it rateable it muft alfo be *productive*: but the Juftices have found that it was not productive, or what is the fame in effect, that it was not proved to be fo to their fatisfaction. That finding concludes the queftion. And then the remaining queftion ftands on the rateability of the property of the truftees. The cafe ftates that they are the occupiers of *the lock* and of the feveral wharfs and warehoufes mentioned in the rate; and it is not difputed that the property rated yields profit: but it is objected that they are rated for *dues* or *rates*, that is, for the tolls payable at the lock under the act of parliament; and that the Court have held tolls not to be rateable. But the Court have only faid that tolls are not rateable *per fe*, but only when connected and rated conjunctively with real and fubftantial property, fituated in the parifh, which, as yielding profit there by means of the tolls, is the proper fubject of

1810.

The KING *against* Sir A. MACDONALD and Others.

of rating within the act of *Elizabeth*. Now here the lock itself is rated, which is something real and substantial, locally situated in the township, and producing profit; and the addition of the *dues* or *rates* is merely giving other names for the same thing. These dues or rates are given by the act of parliament as a compensation to the Duke of *Bridgewater* for the loss of his profits of certain wharfs adjoining to his canal at *Manchester*; which wharfs were before clearly rateable in respect of those profits: the rates, therefore, made payable at the lock were substituted as a compensation for and in lieu of the wharfage before enjoyed: they are the substituted medium of profit arising, as the act describes it, from those wharfs. The Court, therefore, by this decision, will not break in upon that which they have recently decided, that tolls *per se* and when not mixed with a rate upon other property, which, as having substance and locality within the parish, is properly rateable there, are not liable to be rated.

The other Judges concurring,

The Rate and Order of Sessions confirmed.

The KING *against* JOHN NICHOLSON.

Wednesday, May 23d.

The lessee and occupier of an ancient and exclusive ferry, not being an *inhabitant resiant* within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the stat. 43 *Eliz.* c. 2 the occupancy of which subjects the party to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated.

JOHN *Nicholson* appealed to the Sessions against a rate made for the relief of the poor of the township of *Monkwearmouth-shore*, in the county of *Durham*, whereby, as lessee of an ancient ferry, from and between *Sun-*

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derland near the ſea, in the ſaid county, and *Monkwearmouth-ſhore*, he was rated for the tolls of the ſame. The Seſſions confirmed the rate, ſubject to the opinion of this Court on the following caſe:

The appellant *Nicholſon* is an inhabitant of and lives in *Sunderland*, which town lies cloſe to the ſea, at the mouth of the river *Wear*, which divides the pariſh of *Sunderland* from the townſhip of *Monkwearmouth-ſhore*, on the north ſide of the river, maintaining each their own poor. There is an ancient ferry for horſes, goods, and paſſengers, which croſſes the river from *Sunderland* to *Monkwearmouth-ſhore*, and from *Monkwearmouth-ſhore* to *Sunderland*. This ferry until 1795 was leaſed by the *Ettrick* family under the Biſhop of *Durham*, when it was purchaſed by, and now belongs to, the commiſſioners of *Wearmouth* bridge; and the ferry and the tolls thereof are at preſent let by them on a leaſe for three years from *Martinmas* 1808 to the appellant, at the yearly rent of 350*l.* There are two large boats, which keep plying all the day to and from *Sunderland* and *Monkwearmouth-ſhore*, and which are rowed by two in each boat, and the fare or toll paid for a perſon paſſing in the ferry is a halfpenny each way; and of late years for convenience it has been accuſtomed to collect the money of the paſſengers as they enter the boat on either ſide of the river, inſtead of when they go out, as it uſed to be done formerly; and one boat puts off from one ſide of the water when they ſee the other put off from the oppoſite ſide. There is a ſmall boat alſo goes to and from *Sunderland* and *Monkwearmouth-ſhore* during the night; and the inhabitants of *Monkwearmouth-ſhore*, who are cuſtomed as after mentioned, pay the ſame toll or fare of a halfpenny as perſons not cuſtomed do, if they go over in this night boat. The reſpective boats when not uſed have always been locked

1810.

The King against Nicholson.

locked up on the *Sunderland* side of the water, close to the place where the passengers get in on that side. Previous to the year 1710, a dispute having arisen between *Anthony Ettrick* Esq. the then lessee under the bishop of this ferry, and Sir *Wm. Williamson* Bart., respecting the ferry landings on his estate in the township of *Monkwearmouth-shore*, and the ferry dues to be paid by his tenants in *Monkwearmouth-shore* for passing the ferry, it was referred to arbitration: and by an award dated 25th *March* 1710, two places were set out by the arbitrators for the ferry landings in *Monkwearmouth-shore*, and the one of them, which is called the High Landing in the award, is the place where the ferry now lands, and has for a great many years past. And the ferry dues to be paid by his lessees and tenants in *Monkwearmouth-shore* were also fixed by the arbitrators; namely, a cottage 2*s.* 6*d.* and a dwelling-house 5*s.* for one year's passage of the lessee's tenants or inhabitants of each cottage or house; and the ferry was to land from thenceforth in no other place in *Monkwearmouth-shore* but the two places set out by the arbitrators. The ferry dues settled and ascertained by that award for the passage in the ferry boats of the lessees, tenants, and the inhabitants of the cottages and dwelling-houses situate in *Monkwearmouth-shore*, have been paid ever since to the tenant or occupier of the ferry for the time, and are reserved and confirmed to the same lessees, tenants, and inhabitants, in the act passed for the erection of *Wearmouth* bridge in 1792, and amount to from 80*l.* to 100*l.* a year. The ferry has always until the year 1802, when it was let to one *Thomas Wandless*, who lived in *Monkwearmouth-shore*, been let to persons living in *Sunderland*, and been rated to the poor of *Sunderland* for the whole of the tolls or ferry dues: and it has at different times been also rated to the poor of

Monk-

1810.

The King *against* Nicholson.

Monkwearmouth-ſhore; but nothing was ever paid to that townſhip until *Wandleſs* took the ferry; when the pariſh of *Sunderland* having raiſed his rate, in conſequence of his having given an additional rent, he objected to pay, on the ground that part of the tolls of the ferry aroſe and became due in the townſhip of *Monkwearmouth-ſhore*, and were liable to be rated to that townſhip; and the townſhip of *Monkwearmouth-ſhore* having rated him for a part, he appealed againſt the *Sunderland* rate, on the ground before mentioned, to the ſeſſions at *Durham* in *July* 1805, when the point was abandoned by the reſpondents, and *Wandleſs*'s rate to *Sunderland* was amended, and reduced to half of the tolls of the ferry; and the ferry has ſince been continued to be rated to *Monkwearmouth-ſhore* for *one half of the tolls or ferry dues*, including one half of the cuſtom money, and for the other half thereof, including the remaining half of the cuſtom money, to *Sunderland*. The number of paſſengers from *Sunderland* to *Monkwearmouth-ſhore* are about the ſame as from *Monkwearmouth-ſhore* to *Sunderland*. The place where the ferry lands in *Monkwearmouth-ſhore* is of little or no value of itſelf, in caſe it was not uſed for the ferry landing. No queſtion aroſe in this caſe as to the quantum, for it was admitted that the appellant was properly rated in the townſhip of *Monkwearmouth-ſhore* as to quantum, in caſe he is rateable there at all for *any part of the tolls or fees* ariſing or received from or in reſpect of the ferry boats. The Seſſions being of opinion that he was rateable for a moiety of all ſuch tolls or fares, including one moiety of the cuſtom money aforeſaid, confirmed the rate.

This caſe was now argued by *Holroyd*. in ſupport of the order of ſeſſions eſtabliſhing the rateability of the appellant for the profits of the ferry, and by *Hullock* againſt it: and

1810.

The King against Nicholson.

as the case of *Williams* v. *Jones*, next reported, which was argued in the last term, and stood over for consideration till the argument in this case had been heard, involved the same general question, I have collected together in this place all the leading arguments and authorities adduced by the respective counsel for and against the rateability of this species of property.

In affirmance of the rate it was urged that a ferry was real property; an incorporeal hereditament within the parish; local in its very nature, and having locality assigned to it by law: demandable in a præcipe quod reddat (*a*), in counting upon which it must be claimed as

(*a*) No authority was cited for this Quære what of realty is in fact to be *rendered* upon the demand of a *ferry* in such a writ? In *Saville's Rep* 11 it is indeed said to have been holden in the Exchequer chamber, an 23 *Eliz* that a ferry is in respect of the landing place, and not of the water, and that the land on both sides ought to belong to the owner of the ferry. And it is not conceivable how any ferry could have originated by private authority without the assent of the owners of the land on each side except perhaps where the landing on both sides was in a common highway, where the licence of the crown would be presumed. In *Juxon* v *Thornhill*, *Cro Car* 132. [S C 1 *Rol. Abr* 464] the king's licence to the plaintiff to fix locks on the river *Ouse*, which is a common public river, for the easier navigation of it, taking reasonable toll, was only sustained because the locks were *upon the plaintiff's own land* Yet it does not follow that the owner of the ferry should have the property of the soil on either side; for the land owners upon a public river may have granted to the licentee of the king (where the dominion of the banks was not in the king himself) liberty to land passengers, &c from his ferry-boat, and to moor the boat to the shore So ancient gates upon highways are intended to have been by licence of the king [*James* v *Hayward*, *Cro Car* 185.] or the right to have such gates may have been reserved when the land was first granted by the owner for the purpose of a highway. In *Les Termes de la Ley*, 338 a ferry is explained to be "A *liberty* by prescription or the king's grant *to have a boat for passage* upon a great stream for carriage of horses and men for reasonable toll." And in *Curwen* v. *Salkeld*, 3 *East*, 538—544, 5. Ld *Ellenborough* C J said, "If the lord of a manor have a grant of a market within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another within the place named in his grant, &c. The right of removal is incident to his grant, if he be not tied down to a particular spot by the terms of it."

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ſituated in ſuch a pariſh, &c.: an aſſize (*a*) clearly lies for it: the owner may preſcribe for it, and have a ſeiſin in fee of it. Conſidered as a franchiſe, it is a real franchiſe, the exerciſe of which is neceſſarily confined to a certain place. One of the landing places is within the townſhip, to which the defendant is rated, and a moiety of the tolls becomes due and is collected there. There is no diſtinction in principle between the tolls of a ferry and thoſe of a market or canal: the former were held rateable in the caſe of the corporation of *Wickham* (*b*), confirmed in *Atkins* v. *Davis* (*c*): and in the *Staffordſhire* and *Worceſterſhire* canal caſe (*d*), the proprietors, who were empowered by act of parliament to take ſo much per mile per ton, for all goods carried along the canal, were not only held rateable for their lands, wharfs, &c. and other real property in the occupation of their ſervants, but alſo for the *tolls* which became due in the ſeveral pariſhes on the line of the canal where the different voyages ended; though for their own convenience the Company were authorized to collect the tolls where they pleaſed, and did in fact collect them in other pariſhes.

(*a*) This ſeems to be by force of the ſtat *Weſt*. 2. 13 *Ed*. 1. *c* 25. Before that ſtatute the writ of aſſize of novel diſſeiſin de libero tenemento lay only of things of which a præcipe quod reddat lay at common law. [There was however, another writ of aſſize at common law, for common of paſture; though it was doubted whether before that ſtatute an aſſize lay of other commons, for which the proper remedy was by a Quod permittat] 8 *Rep*. 46, 47. 2 *Inſt*. 409—12. But that ſtatute extended the remedy by aſſize to various, perhaps to all caſes of profits apprender in a place certain in which the party had a freehold or intereſt for term of life: amongſt other profits, thoſe of *toll* and *paſſage* are named in the ſtatute; and *paſſagium*, ſays Lord *Coke*, "is properly a "ferry for the paſſage of men and cattle over a water, for which the "owner has a toll: for if a man have paſſage in the veſſel of another "to the church or elſewhere, it is not any profit, but an eaſement, "whereof no aſſize lies, as is adjudged in 31 *Ed*. 3. *Aſſ*. 44." &c.

(*b*) 3 *Keb*. 540. and 1 *Freem*. 419.

(*c*) *Cald*. 328. 333. 338. Sed vide *ib*. 332.

(*d*) 8 *Term Rep*. 340.

1810.

The KING *against* NICHOLSON.

Part of the rate there was ſpecifically on the *tolls and duties* ariſing from the navigation on the canal, *due at Lower Mitton;* the caſe was argued as a rate on *tolls* contradiſtinguiſhed from *land*, &c. and decided on the ground of the tolls, as ſuch, being rateable in the pariſh where they became due, as ariſing and becoming viſible property there. The like deciſion upon the ſame principle had before been made in *The King* v. *Page* (*a*). [Lord *Ellenborough* C. J. In theſe caſes the queſtion did not turn ſo much on the rateability of the property, conſidered merely as *tolls*, as on the proper place where they were to be rated; for in all theſe caſes the tolls were in reſpect of the land and ſoil of the canal which was veſted in the proprietors. In general the rate has been impoſed on ſome real property in the pariſh out of which the tolls aroſe, as on the ſluice in *The King* v. *Cardington* (*b*), and in the *Salters'* Load ſluice caſe (*c*). *Bayley* J. All the caſes of tolls held rateable have been where the tolls aroſe out of the uſe of land.] Yet in *Atkins* v. *Davis* (*d*), *Buller* J., ſpeaking of the caſe of *The King* v. *Cardington*, ſaid, that *Palmer*, who was there rated in reſpect of the tolls, had no property either in the ſoil or in the water, but had merely a power of erecting ſluices and taking tolls. Neither was the ſoil of the *Aire* and *Calder* rivers veſted in the undertakers of the navigation, yet in their caſe (*e*) the tolls and duties of the navigation, which they were authorized to collect by act of parliament, were held rateable (apart from the lands, wharfs, &c. in their own occupation,) in the two pariſhes where the collection was made in

(*a*) 4 *Term Rep.* 543. (*b*) *Cowp.* 581. (*c*) 4 *Term Rep.* 730.

(*d*) *Cald.* 326. and vide *ibid.* 335. S. P. by *Willes* J. That was the caſe of the *London* Bridge water works, rated in diſcharge of damages recovered under the riot act, which ſpeaks of ability in general, and does not ſpecify, like the ſtat 43 *Eliz*, any particular taxable objects.

(*e*) 2 *Term Rep.* 660.

reſpect

respect of the whole line of the navigation, which ran through several intervening parishes. So in the case of the *Leeds* and *Liverpool* canal (*a*), the company were rated specifically for their *tolls* of the navigation as well as for their warehouse and land. [Lord *Ellenborough* C.J. The undertakers of the *Aire* and *Calder* navigation had I believe real property in the parishes where the tolls were collected; and the rate was upon the tolls conjoined with that property, which property was rendered so much more productive by reason of the tolls collected there. So in the *Leeds* and *Liverpool* case it was a conjunctive rating. The tolls were held rateable for the canal within the parish. But is there any case of rating tolls where the owners had no land or visible property in the parish?] In every case where *tolls* have been rated as well as land, the order of sessions confirming both conjunctively ought to have been quashed instead of being confirmed, if the Court had not considered that both were rateable. [Lord *Ellenborough* C. J. The great difficulty is to bring the case within the words of the stat. 43 *Eliz. c.* 2. conferring the authority. The party rated must be either an inhabitant of the parish, or he must be an occupier of one or other of the descriptions of property mentioned in the statute: and within which does this appellant come? The case states him to be in fact an inhabitant of another place.] He may be considered as an occupier of land in respect of the use which he has of the water which covers the land, and is part of the realty. The word *lands* is used in the statute as the nomen generalissimum for every species of real property, incorporeal as well as corporeal: "all "lands, and *all real property*, are rateable to the poor,"

(*a*) 5 *East*, 325.

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1810.

The King *against* Nicholson.

ſaid Lord *Mansfield* in *Rex* v. *Gardner* (*a*). At all events he may be conſidered as an *inhabitant* of the townſhip within Lord *Coke*'s (*b*) extended ſignification of that word in his conſtruction of the ſtatute of bridges, as comprehending all who have lands and tenements in poſſeſſion, though living in a foreign county. In like manner the ſtat. 43 *Eliz.* may be taken to include every perſon occupying any ſpecies of property, or exerciſing any local franchiſe producing profit to him within the townſhip; for this forms part of his ability there. A leſſee of tithes, though he do not reſide within the pariſh, is certainly rateable. This is not the caſe of a mere eaſement, but the party has an intereſt in the place. The tolls of a lighthouſe were held in a late caſe (*c*) not to be rateable, becauſe neither the ſhips in reſpect of which the tolls became due were within the pariſh, nor were the tolls received there: that caſe, therefore, does not conclude the preſent.

Againſt the rateability of *tolls*, it was contended that the queſtion was one of ſtrict conſtruction upon the words of the ſtat. 43 *Eliz.* c. 2. by which alone the power of rating to the relief of the poor was given. The ſtatute directs the neceſſary ſums to be gathered out of the pariſh according to its ability by taxation of every *inhabitant*, &c. and of every *occupier* of *lands*, &c. and no man can be rated except as an inhabitant or occupier (*d*). Here the caſe negatives that the appellant was an *inhabitant* of this townſhip; and the only queſtion which can be made is, whether he were an *occupier* of *lands*. [Lord *Ellenborough* C. J. aſked whether the counſel were aware

(*a*) *Cowp.* 84. (*b*) 2 *Inſt.* 702. (*c*) *Rex* v. *Tynemouth*, ante, 46.
(*d*) By Lord *Mansfield*, in *Rex* v. *Gardner*, *Cowp.* 83.

of any case where the word *inhabitant* in the statute of *Elizabeth* had been held to mean any other than *resident*: and was answered that there was no such case: that the question was raised in the *Liverpool* and *Hull* cases (*a*).] In every case where a rate in respect of personal property has been established, the party rated has appeared to be an actual inhabitant of the place. It is argued that the word *lands* includes all real property, and that a ferry is real property; but no authority has been cited for that position: no instance has been shewn of an ejectment brought for a ferry, or of a præcipe quod reddat lying for it. But however that may be, that is not the criterion for its rateability. The rule was laid down in *The King* v. *Andover* (*b*), and has been long established, and lately recognized in *Rex* v. *St. John Maddermarket*, in *Norwich* (*c*), that a person is only rateable for his local *visible* property within the parish: the property must be visible and tangible to make it the subject of *occupation*. When, therefore, this is argued to be an incorporeal hereditament, it does not follow, nor is there any authority to shew, that a person is rateable for an incorporeal hereditament in the place where he does not reside. The specific mention of *tithes* in the statute bears against the argument, and shews that without such express mention the owner would not have been rateable for that species of property under the general word *lands*; and expressio unius est exclusio alterius. This is a rate on the *tolls* of a ferry, in other words, upon the profits made by the manual labour of working the ferry boats; that is upon the freight of the boats; and that too in a

(*a*) *H.* 38 *G.* 3. *B. R.* vide 8 *East*, 455. *n.* and 457. *n.* and vide per *Lawrence* J. in *Rex* v. *Jones*, *ib.* 462.

(*b*) *Cowp.* 565.

(*c*) 6 *East*, 186, 7. and vide *Rex* v. *Jones*, 8 *East*, 461.

1810.

The KING *against* NICHOLSON.

place where the owner does not reside, and where the boats are not kept. And though if he were an *inhabitant* of the township the ferry boats of which such profit was made might furnish a local visible criterion of the party's ability, yet in no other character could he be rated for such profit. The right of conveying persons from the one side of the highway to the other is a mere franchise or privilege: the right of landing on the soil of the highway is common to all the king's subjects alike: so far, therefore, from the owner of the ferry having any interest in the soil itself, he has not even the exclusive right to the use of it. Other boats may land there, though they may not carry passengers or cattle for hire. [Ld. *Ellenborough* C. J. The owner of the ferry may be said, perhaps, to have a right to make a special use of the highway; but he cannot be said to have the occupation of the highway.] It is merely *toll thorough*, which is taken for passing over the highway, in consideration of repair or other benefit done by the owner of the toll, but without any interest or claim in the soil; and not a *toll traverse*, which originates in the liberty given to pass over the owner's soil (*a*). In *Jolliffe*'s case (*b*) the grantee of a way-leave, which is a mere easement, was held not to be rateable for it: and a ferry is no more than a public easement. All the cases of rating in respect of real occupancy have been where the subject-matter was corporeal visible property in the parish, whatever the form of the rate may have been. In the case of the market toll of *Wickam* (*c*), the corporation

(*a*) Vide *Lord Pelham* v. *Pickersgill*, 1 *Term Rep.* 660. where this subject is fully discussed.

(*b*) 2 *Term Rep.* 90.

(*c*) 3 *Keb.* 540. and 1 *Freem.* 419. Vide *Rex* v. *Gardner*, *Cowp.* 79, a corporation may, by its officers or servants, be an inhabitant or occupier within the statute 43 *Eliz.*

were

were probably the owners of the soil. In the other cases (*a*), where tolls have been rated, the persons have been rated for them conjunctively with tangible real property, out of the use of which they arose, such as sluices, towing-paths, engines, boats, wharfs, warehouses, canals, and the like: but in *Rex* v. *Rebow* (*b*), and *Rex* v. *Tynemouth* (*c*), the *tolls* of a light-house were held not to be rateable, whatever the light-house itself might have been under different circumstances. Turnpikes are said not to be rateable on account of the application of the tolls to public purposes; but though they were private property, the occupier would only be rateable for the turnpike-house, and not for the *tolls* eo nomine. And in the case of the sluice, being fixed to the freehold, it could be no other than real property; capable therefore of occupation (*d*), and the occupier of which had such exclusive possession of it as would have enabled him to maintain trespass.

Lord ELLENBOROUGH C. J. There was a case of *Williams* v. *Jones* (*e*) argued in the last term, which in principle is the same as the present, and will be governed by it, unless the Court should hereafter see any special ground on which to distinguish it. The rate is here imposed on the *tolls* merely of the ferry: and the question is, Whether the proprietor of the ferry, who is not an inhabitant of the township in which he is rated, be liable

(*a*) *Rex* v. *Cardington*, *Cowp*. 581. *Rex* v. *Salter's Load Sluice*, 4 *Term Rep*. 730. *Rex* v. *Page*, *ib* 543. *Rex* v. *The Mayor*, &c *of London*, *ib*. 21. *Rex* v. *St. Nicholas*, *Gloucester*, *Cald*. 262. and *Rex* v. *Hogg*, 1 *Term Rep*. 721.

(*b*) 1 *Const's Bott*, 115. (*c*) Ante, 46.

(*d*) Reference was made to the stat. 6 & 7 *W*. 3. *c*. 16. to prevent exactions of the *occupiers* of locks and weirs upon the *Thames*.

(*e*) See the next case, *post*. 344.

1810.

The King *against* Nicholson.

to be rated for such tolls received by him there? And this being a question upon the construction of the stat. 43 *Eliz.* c. 2. it is material to look to the words of it. By that statute the parish officers, by consent of two justices of peace, are directed to raise a competent sum for the relief of the poor by taxation of "every *inhabi-* "*tant*, parson, vicar, and other, and of every *occupier* of "lands, houses, tithes impropriate, propriations of tithes, "coal-mines, or saleable underwoods in the said parish." Now *tolls* do not come within any one specification of occupancy described by the statute: they are not *lands*, nor houses, &c. If, therefore, the owner be taxable for them at all, it must be as an *inhabitant* of the parish out of which they arise: but there is no case in which the word *inhabitant* in that statute has been held to mean any other than a resident within the parish. In the cases which have occurred of rating in respect of personal property, such as *The King* v. *Liverpool*, and *The King* v. *Collison*, which are mentioned in *The King* v. *Jones* (a), residence was considered necessary to constitute inhabitancy. But we are reminded of cases where *tolls* arising from navigable canals, to which the tolls of a ferry are assimilated, have been held rateable, without any reference to the question of inhabitancy: and the *Wickham* case is much relied on, where a corporation was held rateable for market-tolls: but they were the lords of the soil where the market was held, in respect of which they were rated for the tolls. In the case of *The King* v. *Cardington* (b) the rate was specifically upon the sluices, on that which was local and visible property, and producing profit within the parish; and all the cases where

(a) Vide 8 *East*, 451, 5, 7. (b) *Cowp.* 581.

tolls

1810.

The KING *against* NICHOLSON.

tolls have been held to be rateable, when they are examined, will be found to have proceeded on that ground. It was so in the case of the *Staffordshire* and *Worcestershire* canal (a): the company were there rated for "their basins, towing-paths, and that part of their canal and the locks lying within *Lower Mitton*, and for the *tolls and duties arising therefrom* due at *Lower Mitton*. There could be no doubt that the *basins, towing-paths, canal and locks*, were local visible property there, and the *tolls and duties arising therefrom*, classed and connected as they are with the local visible property rated, were considered as resulting from that local and visible property. In all these cases the tolls have arisen from the use of the canal, which is local and visible, being part of the land itself, lying within the parish where the tolls have been rated. But there is no case where tolls detached altogether from local real property have been held to be rateable *per se*. When, therefore, we are called upon to decide such a question for the first time, I am always disposed to go to the fountain-head, which is the act of the 43 *Eliz.*; and looking at the words of that act, I do not find any of them which extend to rate any person not being an inhabitant of the place, nor the occupier of any of the specific kinds of property mentioned in the act. And not finding any description in the statute which applies to the case of this appellant, I cannot hold him to be rateable for these tolls.

GROSE J. declared himself of the same opinion for the reasons given by his lordship, which he thought it unnecessary to repeat.

(a) 8 *Term Rep.* 340.

1810.

The King against Nicholson.

Le Blanc J. The appellant is rated ſpecifically as the leſſee of the ferry for *half of the tolls or ferry-dues* in the townſhip of *Monkwearmouth-ſhore*; and it is found that he is an inhabitant of and lives in *Sunderland*: and it is not ſtated that he is the occupier of any property in *Monkwearmouth-ſhore*: and that brings it to the ſimple queſtion, whether a perſon reſiding out of the townſhip be rateable there for the tolls of a ferry, which tolls ariſe and become due to him for carrying paſſengers and cattle from the one ſhore to the other, one of which lies in the townſhip. The origin of his rateability, if it exiſt at all, muſt be ſought for in the ſtat. 43 *Eliz.*, which does not extend in terms to this caſe. At the ſame time if the words of it had received ſo extended a conſtruction as to include this caſe in the various deciſions which have taken place upon the rating of the proprietors of canal navigations, I ſhould have been diſpoſed to adhere to the ſettled courſe of conſtruction. But this point not having been decided in thoſe caſes, I cannot, upon reverting to the words of the ſtatute, conſider the appellant as coming within any of the deſcriptions of perſons rateable there given. It is contended that he is an *inhabitant* of the townſhip within the meaning of the act, and that he is alſo within it as an *occupier of real property*. Now when the word *inhabitant* is uſed as well as *occupier*, I muſt conſider that by the former was meant a perſon who was *reſident* in the place; for one might occupy without being reſident, and the ſtatute meant to include both: but this appellant is found to have been reſident in *Sunderland*, and in that ſenſe is not an inhabitant of *Monkwearmouth-ſhore*. Then, as to his occupation of real property in the latter townſhip; if this ferry and the tolls be real property, ſtill the appellant is

not

not the occupier of fuch real property as is mentioned in the act of parliament. But they are compared to the tolls of a canal, which it is faid have been held to be rateable property within the ftatute: it will be feen however, upon examination, that in all thofe cafes the parties claiming the tolls for which they were rated had an intereft in fome local and vifible property within the parifh connected with their intereft in the tolls; as where they were made payable at their own wharfs or warehoufes, where the goods carried on the canal were received or depofited; or in refpect of the line of canal by which they were carried paffing through the parifh where the tolls were rated. The cafe of the owner of the packet-boats (*a*) comes very near to that of a perfon who has an exclufive right of carrying paffengers and goods in a ferry-boat; but the packet owner was only held to be rateable for his profits in the parifh where he refided, and where the boats were kept, and produced the profit to him; and he was confidered not to be rateable in any other place to which the boats failed where he was not refident. The appellant, therefore, is not rateable for this property within the words of the ftatute, or the decided cafes upon it, either as an inhabitant, or as an occupier.

BAYLEY J. This perfon is neither an inhabitant of the townfhip within the meaning of the ftatute, nor an occupier of any of the fpecies of property mentioned in it: and when we are called upon to put a conftruction on the act for the firft time, we ought to abide by the words of it. In a ftatute which mentions *inhabitant* as well as *occupier*, inhabitant muft mean *refident*, otherwife

(*a*) *Rex* v. *Jones*, 8 *Eaft*, 451.

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1810.

The King against Nicholson.

it would for this purpose mean the same as occupier. But the appellant is said to be an occupier of the tolls, and that *tolls* have been held rateable eo nomine in several cases: but in all those cases it will be found that the persons rated were the occupiers of *lands* within the place, in respect of which the tolls in the whole or in part were payable. In *The King* v. *Cardington* the party was rated for the *sluice* of which he was the occupier, which sluice was real property. In the case of canal tolls, the proprietors rated were the occupiers of the canals; and canals are real property: they are land applied to a particular purpose, and the tolls are the profits arising from that use of the land, and are given to the proprietors as a compensation for the use of it in that manner. Here the appellant was not an inhabitant of *Monkwearmouth-shore*, and he was not an occupier there of any real property, for which he was rateable.

Order of Sessions quashed.

Wednesday, May 23d.

Williams, Executrix of Hugh Williams, *against* Jones and Hughes.

The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry-boats were secured by means of a post in the ground; the soil itself at the landing-places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it.

THE plaintiff brought a writ of error to reverse a judgment given against her testator in the court of Great Session of *Anglesey*, in an action of trespass by *Hugh Williams*, the plaintiff's testator, against *Jones* and *Hughes*, for taking his ferry-boat on the 2d of *June* 1806, at *Beau-*

maris,

maris in the county of *Anglesey*, and selling the same, and converting the money arising therefrom to their own use. The defendants pleaded not guilty, and also two several justifications; the substance of which was, that the supposed trespass was done by them in executing a warrant of distress duly issued after summons, &c. by two justices of the peace for the county of *Anglesey*, against the said *Hugh Williams* for non-payment by him of a rate made for the relief of the poor of the parish of *Llandyssilio* in the said county, in which rate he was assessed as proprietor and occupier of *Porthaethwy* ferry in that parish, in the sum of 10*l.* 13*s.*; and the payment of which was first duly demanded of and refused by him. The plaintiffs below replied that the defendants of their own wrong, and without the cause by them alleged, committed the trespass complained of; and on issue joined, a special verdict was found, stating in substance;

That *Hugh Williams* was the proprietor of *Porthaethwy* ferry, and of the tolls thereof; the same being an ancient ferry for the conveyance of persons, cattle, and carriages, in boats across an arm of the sea, called the straits of *Menai*, or the river *Menai*, from the county of *Carnarvon* to the county of *Anglesey*, and vice versâ: and the king's highway from *London* to *Holyhead* leads to and from the said arm of the sea, within the limits of the ferry. For many years past there have been and now are five landing-places in the parish of *Llandysilio* in *Anglesey*, used by the ferry-boats on landing from the opposite shore; which landing-places have, within four years before the making of the rate in question, been repaired and improved by Mr. *Williams*, the proprietor of the ferry: and for divers years last past there hath been and now is a post fixed in the ground at one

of

1810.

WILLIAMS *against* JONES.

of the landing-places, to which post the ferry-boats have been and are usually moored when lying on the *Anglesey* side. The said arm of the sea is open at one end to the bay of *Carnarvon*, and at the other end to the *Irish* sea, and is navigable for all the king's subjects: and they have always of right landed at the several landing-places at their pleasure; and the proprietor of the ferry never had nor hath the sole or exclusive use of the said landing-places, or either of them; but has the sole and exclusive right and privilege of conveying by his boats persons, cattle, and carriages, for hire, from a part of the said king's highway lying in the parish of *Bangor*, in the county of *Carnarvon*, to another part of the said king's highway, lying in the parish of *Llandysilio* in *Anglesey*, and vice versâ. During all the time aforesaid the ferry-boats have been worked and navigated by the proprietor's servants, hired and paid by the day; and the tolls and hire due and payable for such conveyance from the county of *Carmarthen* to the county of *Anglesey* have been in fact paid to his servants for the use of the proprietor of the ferry, sometimes upon the said arm of the sea, a little before the arrival of the boats at the landing-places, and sometimes in the boats at the landing-places, and at other times upon the landing-places in the parish of *Landysilio*, after the persons paying the same have landed. And the proprietor's servants have from time to time paid over the tolls and hire so received by them to his agent, residing in part of a dwelling-house, whereof *Hugh Williams* is seised in fee, in the parish of *Llandysilio*, of which house one *T. B.* is tenant, and has continually been rated in his own name to the relief of the poor of the said parish of *Llandysilio*, and has paid the rates assessed upon him. And *Hugh Williams*'s agent has never

never been rated, nor ever paid any poor rates: and such agent has from time to time, monthly, paid over such tolls and hire to another agent of *Hugh Williams* at *Beaumaris*, in *Anglesey*, out of the parish of *Llandysilio*, for the use of *H. Williams*. *H. Williams* never inhabited or dwelt in the parish of *Llandysilio*, and no proprietor of the ferry or tolls, or other person in respect thereof, has at any time been rated for the same to the relief of the poor of the parish of *Llandysilio* before the making of the rate in question. The special verdict then stated that *Hugh Williams* being such proprietor of the ferry, before the trespass complained of, a rate for the relief of the poor of the parish of *Llandysilio* was duly made, dated the 6th of *February* 1806, in which he was rated *for Porthaethwy Ferry and the tolls thereof*, at the sum of 10*l.* 13*s.*; which rate was afterwards duly allowed by two justices of the peace for the county of *Anglesey*, and duly published in the parish church of *Llandysilio*; and payment was afterwards duly demanded of Mr. *Williams* by the defendants, the parish officers of *Llandysilio*; but he refused to pay the same. And then it stated the complaint of the parish officers to two magistrates of the county; the summons issued to Mr. *Williams* to answer before the magistrates; his default; and the due issuing of the warrant of distress, by virtue of which the defendants distrained one of Mr. *Williams*'s boats for the amount of the rate, &c. But whether upon the whole matter the defendants of their own wrong, and without the cause alleged by them in their justificatory plea, committed the trespass, the jurors prayed the advice of the Court, and found a verdict of guilty or not guilty accordingly. The Court below gave judgment for the defendants; and the plaintiff below

having

1810.

WILLIAMS *against* JONES.

having in the mean time died, his executrix brought this writ of error.

This cafe was argued in the laft term by *Abbott* for the plaintiff, and by *Barnes* for the defendants. The general arguments urged by them for and againft the rateability of this fpecies of property have, to avoid repetition, been interwoven with thofe urged by the counfel in the laft cafe, which was decided immediately before this. Some additional obfervation was made in this cafe upon the circumftance of the poft driven into the foil, to which the ferry boats were fometimes made faft on the *Llandyfilio* fhore; but *the Court* confidered that this did not effentially vary the prefent queftion: for the owner of the ferry was not found to have any property in the foil of the highway; and fuppofing that he had a right to make fuch a fpecial ufe of the highway for the purpofe of fecuring his ferry boats, that did not make him the occupier of the highway; nor gave him any exclufive poffeffion of it; nor could he maintain trefpafs for any injury done to the foil at the landing-places, which were common to all the king's fubjects to land and pafs upon. And now, after the judgment in the former cafe had been delivered,

Lord ELLENBOROUGH C. J. declared the opinion of the Court, that the decifion of this cafe neceffarily followed that of the other, the queftion in both being fubftantially the fame; and therefore they reverfed the judgment of the Court below.

Judgment reverfed.

The KING *against* The Inhabitants of MITCHAM.

Wednesday, May 22d.

A hiring at so much a week for as long time as the master and servant could agree is only a weekly hiring, under which no settlement can be gained

REBECCA the wife of *George Pendry* was removed with her children, by an order of two justices, from the parish of *Mitcham*, in *Surry*, to the parish of *Burghfield* (called in the order *Birchfield*) in the county of *Berks*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case.

Joseph Pendry, being settled in *Burghfield*, was hired by *Graves*, the keeper of a toll-gate in the parish of *Egham*, *at 3s. a week for as long time as his master and himself could agree*, to assist in collecting the tolls; and continued to serve under such hiring for more than a year, during which time he assisted *Graves* in collecting the tolls, and occasionally took care of a horse and some hounds. *Graves* had no horse at the time he so hired *Pendry*, but bought one afterwards. The hounds were kept in premises belonging to the toll-house; and *Pendry* during all that time resided in the toll-house. *Graves* did *not* hire him as he had before hired a brother of *Pendry*, with whom he expressly contracted as for a *yearly* servant. *Graves* paid *Pendry* as he wanted money, pounds at a time. *Pendry*, after the hiring, married the pauper *Rebecca*, by whom he had the three children named in the order of removal, and afterwards deserted his wife and children.

Nolan and *Roots*, in support of the order of Sessions, endeavoured to shew that this was a *yearly* and not a *weekly* hiring of the pauper by the turnpike-gate keeper, in the parish of *Egham*; it being for an indefinite period,

as

1810.
The King
against
The Inhabitants
of
Mitcham.

as long as master and servant agreed, though the quantum of wages was to be ascertained by the number of weeks in which the service was in fact performed. They admitted the general rule, as laid down in *Rex* v. *Newton Toney* (*a*), that a mere hiring at so much a week, without more, would not give a settlement; but here the parties looked to an indefinite period beyond the week, for the hiring was to continue at the rate of 3*s.* a week till the disagreement of one of the parties was expressed; and in *Rex* v. *Hampreston* (*b*) a hiring at so much a week, with liberty to part at a month's notice, was held to be a general hiring. They also referred to *Rex* v. *St. Ebbs* (*c*); where the party was only specifically hired for a quarter of a year, at the rate of 20*s.* a year, but if he and his master liked each other *he was to continue on*: and the servant having served for above a year after the quarter, was held to gain a settlement.

Lord Ellenborough C. J. That was an indefinite hiring, at the rate of so much a year, determinable at the end of the first quarter. This case is nothing more than a hiring at so much a week, which, where nothing else appears to the contrary, is a weekly hiring within the rule laid down in *The King* v. *Newton-Toney*; and it cannot alter the case by adding that which must necessarily have been understood, that the hiring was to continue as long as the master and servant agreed; that is, from week to week.

Le Blanc J. The case of *The King* v. *Hanbury* (*d*), which was subsequent to that of *Hampreston*, confirmed the rule laid down in *The King* v. *Newton Toney*.

Per Curiam, Order of Sessions quashed.

(*a*) 2 *Term Rep.* 453. (*b*) 5 *Term Rep.* 205. (*c*) Burr. S. C. 285.
(*d*) 2 *East*, 423 and vide *Rex* v. *Pucklechurch*, 5 *East*, 382.

Nolan and *Littledale*, in support of the rate, relied principally upon the authority of *Rowls* v. *Gell* (*a*), where the owner (lessee under the crown) of lead mines was held rateable to the poor for the profits of *lot* and *cope*, which were certain duties paid to him by the adventurers, without any risk incurred by himself in the adventure: though they admitted the pressure of the recent decision of the Court in *Williams* v. *Jones* (*b*). Before that decision they said that they were prepared to contend that the words "*lands*, *houses*, &c. in the stat. 43 *Eliz. c.* 2. the occupiers of which were made rateable to the relief of the poor, were only mentioned in the statute by way of example, and that the legislature meant to subject to the same taxation every species of real property. By the resolutions of the judges of assize in 1633 (*c*), to the question whether shops, salt-pits, profits of a market, &c. be taxable to the poor as well as *Lands*, coal mines, &c. expressed in the statute; the answer is, "all things which are *real* and *a yearly revenue* must be taxed to the poor." In *The King* v. *St. Agnes* (*d*), the person entitled to toll-tin and farm-due, being certain proportions of the tin raised by the adventurers, was held rateable for such proportions received by him. It cannot vary the case that this payment is reserved to the lessors by the name of a rent. Rents are only held not taxable where the whole profit of the land is in the first instance taxable in the hands of the tenants or actual occupiers; in which case it would be twice taxed, if the landlord were again taxed for his rent: but the ground of the former decisions was, that the adventurers were not taxable for their profits, which were precarious, and therefore the lord or owner,

(*a*) *Cowp.* 451.
(*b*) *Ante*, 346.
(*c*) *Dalt. Just. ch.* 73. *p.* 235. *Q.* & *R.* 19.
(*d*) 3 *Term Rep.* 480.

who

1810

The King *against* The Bishop of Rochester and Others

who run no risk, was taxable for what he received in respect of his real profit: but the landlord or owner has always been considered taxable for any profit of the land received immediately by him, for which the tenant or actual occupier was not assessable. This principle appears to be recognized by Lord C. J. De Grey in delivering the judgment of the Exchequer Chamber in *Ld. Bute* v. *Grindall* (a), and by the Courts of *K. B.* and *C. P.* in *Eckersall* v. *Briggs* (b), *Atkins* v. *Davis* (c), and *Holford* v. *Copeland* (d). In all these cases it seems to be taken for granted that rents and other annual profits of land are rateable, unless where the tenant is assessable for the whole annual value of such land in his occupation; and in none of these cases is any notice taken of the residence of the proprietor in the parish in which the property lies. *Occupier* in the statute of *Elizabeth* was meant to be used in the popular sense, as *possessor*, that is, of real property: and *inhabitant* has always been considered as extending to include the owners of every species of property in the place, whether lying in grant or in livery. The great distinction as to residence lies between real and personal property, where the owner is rated for his ability generally; which must of course be in the place where he resides; for there only can it be visible: but all local visible property, yielding annual profit, is rateable in its nature; and real property can only be rated in the place where it is situate, and where alone it is visible and produces profit. [Ld. *Ellenborough* C. J. What is there in this case, which is to be the subject-matter of rating, but a contract, by which the landlords get a certain profit for granting to others a liberty of mining, when perhaps the

(a) 2 *H. Blac.* 265. (b) 4 *Term R.* 6
(c) *Cald.* 315. (d) 3 *Bos. & Pull.* 129—143.

tenants

tenants may never be able to make any profit at all from the land, which may be wholly unproductive? *Bayley* J. In *Rowlls* v. *Gill*, and *The King* v. *St. Agnes*, the property for which the lords were rated was not demised. *Le Blanc* J. The argument goes the length of contending for the rateability of all rents in the hands of landlords.] It does so where the subject-matter is not rateable in the hands of the tenants.

Dampier, *Raine*, and *Hullock*, contrà. The demise is of all mines, &c. within a certain district, with a licence to dig for ore, &c. and a money rent is reserved in respect of that licence, but nothing has yet been produced by the land, which land is rateable, if at all, in the hands of the tenants for its annual produce, so far as the subject-matter produced is in itself liable to be assessed within the construction of the stat. 43 *Eliz.* But this is an attempt to rate a money-rent in the hands of the landlords, none of whom reside in the parish, and who not being rateable as *inhabitants*, can only be rated, if at all, as actual occupiers of land within the parish. It must therefore be shewn that the receipt of rent elsewhere is an actual occupation of the land in respect of which such rent is reserved; which must go the whole length of establishing that landlords are liable to be rated, as well as tenants; and this, even though the land produce no annual profit at all in the hands of the tenant. If this were so, a landlord would by the same rule be rateable for the profits of his timber. It has been long settled that no other mines than *coal* mines, which are expressly mentioned in the statute, are rateable at all; but by the construction now contended for, they would be made rateable in the shape of rent in the hands of the landlords by whom they were leased out. The decision in *Rowll's* v. *Gill*, on which

1810.

The KING against The Bishop of ROCHESTER and Others.

The King v. *St. Agnes* proceeded, was doubted by Lord *Kenyon* in *Rex* v. *Parrott* (*a*). But this case is at all events distinguishable; for there the profits of the lord arose immediately from a certain proportion of the ores brought to the surface without any expence or risk on his part; but here the ores are demised, and the landlords receive a certain money-rent for their interest in the land during the lease, whether any ores be raised or not; which rent is not the subject-matter of occupation within the parish. Then there is neither inhabitancy nor occupation, in respect of which the landlords can be rated in this parish.

Lord ELLENBOROUGH C. J. The trustees can only be rated as inhabitants or as occupiers within the parish. We have so recently (*b*) put a construction upon the word *inhabitant* in the statute of *Elizabeth*, as meaning a *resident* within the parish, that it is unnecessary to discuss the matter again; and the fact of such an inhabitancy is negatived by the case. Neither are they *occupiers* of the property for which they are rated; so far from it, that they cannot maintain trespass for any injury done to the property which they are supposed to occupy: and even if they were the actual occupiers of coal mines, they would not be rateable for them before they were worked and productive (*c*). But this is no more than a contract with tenants for the payment of a certain rent for ores supposed to lie under the surface; and if the tenants should open the ground

(*a*) 5 *Term Rep.* 596.

(*b*) *Rex* v *Nicholson*, ante, 330. and *Williams* v. *Jones*, ante, 346.

(*c*) Vide *Rex* v *Bedworth*, 8 *East*, 387. where the lessee of a coal-mine, which, having ceased to be productive, was no longer worked, was held not liable to be rated for it, although he was still bound by his covenant to pay the rent reserved to his landlord.

1810.

The KING against The Bishop of ROCHESTER and Others.

ground and raiſe the ore, reſerving a certain proportion of ore to the ground landlords. There is no occupation of any thing within the ſtatute. If hereafter the tenants ſhould open the ground and raiſe ore, the truſtees will then be entitled to certain proportions, and ſuch profits may come within a different rule, as lot and cope; upon which no queſtion at preſent ariſes, and therefore it is unneceſſary to ſay any thing.

GROSE J. was of the ſame opinion.

LE BLANC J. If the truſtees were rateable at all, it muſt be as occupiers of the mines or ſome proportion of them: but here they are rated as for a *rent* eo nomine, for which, if they were rateable, every landlord might by the ſame rule be rated for his rent.

BAYLEY J. declared himſelf of the ſame opinion.

Order quaſhed.

The KING *againſt* The Inhabitants of DIDDLEBURY.

Wedneſday, May 23d.

The pariſh in whoſe favour an order of removal is made may by conſent abandon it, without waiting to appeal to the Seſſions and having it quaſhed there. And after ſuch order cancelled by the removing magiſtrates, with the conſent of both pariſhes before the time of appeal, another order made by them, removing the pauper to a different pariſh, was held good.

TWO juſtices by their order of the 15th of *Aug.* 1809 removed *Mary Davies*, ſinglewoman, with child, from *Much Wenlock* to *Diddlebury*, both in the county of *Salop*. The Seſſions, on appeal, confirmed the order, ſubject to the opinion of this Court on the following caſe.

Soon after the tranſlation ſeſſions in *July* 1809, two juſtices by an order removed the ſaid *Mary Davies* from *Much Wenlock* to *Long Stanton* pariſh, in the ſame county;

 by

1810.

The King against The Inhabitants of Didlesbury.

by virtue of which order she was conveyed by the parish officers of *Much Wenlock*, and delivered by them, with the order, to the parish officers of *Long Stanton*, who received her accordingly and maintained her there for five weeks at the expence of *Long Stanton* parish. On the 15th of *Aug.* following, doubts having been entertained whether the order made in *July* preceding could be supported by evidence, a meeting was had between the parish officers of *Much Wenlock*, and the parish officers of *Long Stanton*, who finding the account given by other witnesses was different from that given by the pauper, on whose evidence the first order of removal to *Long Stanton* had been made, and being of opinion that it could not therefore be supported; they mutually agreed to cancel that order; which they accordingly did, with the consent of the magistrates who had made it; and who thereupon made another order, which is the order now appealed against, and which was made before any Sessions had intervened to which any appeal against the first order could be made. There was no appeal against the order of removal to *Long Stanton*.

When this case was called on, *Le Blanc* J. said that the point had been expressly decided in the case of *The King* v. *Llanrhydd* (*a*); and Ld. *Ellenborough* C. J. said that the point was so clear upon principle that it did not want any authority to support it. *The Court*, therefore, thought it unnecessary to hear *The Attorney-General* and *Holroyd* in support of the orders. And after *Peake* and *Puller* had referred to *Chalbury* v. *Chipping Faringdon* (*b*), and urged shortly that however an order made might be abandoned before execution, it could not afterwards; but being in the

(*a*) *Burr. S C.* 658. (*b*) 2 *Salk.* 488.

ture

nature of a judgment executed, it could only be reversed by appeal;

1810.

The KING against The Inhabitants of DRINKSTONE.

Lord ELLENBOROUGH C J. said there are two ways of getting rid of an order, one by consent of the parish in whose favour it is made to abandon it; the other, by waiting till the time of appeal and appealing against it to the Sessions, by whom it may be quashed if not supported. Here the parish in whose favour it was made, finding upon further information that they could not support it, very sensibly determined to abandon it at once by consent, and acted accordingly. And what objection can there be, as Ld. *Mansfield* observed in the case mentioned, to a party's abandoning a judgment intended for his own benefit? In the case in *Salkeld* there was no consent of the party in whose favour the order of justices was made to vacate it.

Per Curiam, Orders confirmed.

The KING *against* The Inhabitants of HINCKLEY.

Wednesday, May 23d.

An indenture binding out a poor apprentice, executed by *W S church-warden, and* J G. *overseer* of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negativing its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good by intending that there were two overseers for the hamlet as required by stat. 13 & 14 *Car.* 2 c 12 *f* 21. and only *one church-warden* by custom in the same place; and therefore the apprentice serving 40 days under it gains a settlement.

UPON an appeal from an order of Justices, removing *Diana* the wife of *James Adu* from *Stoke* in *Coventry* to *Hinckley* in *Leicestershire*, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

James Adu, the pauper's husband, was in *April* 1800 put out as a parish apprentice by the hamlet of *Atterton*, and

1810.

The King *against* The Inhabitants of Hinckley.

and ferved more than 40 days in the parifh of *Hinckley* under fuch indenture. The indenture run thus:—This indenture made the 2d day of *April* 1800, in the 40 *G.* 3. &c. witneffeth that *W. Sketchley*, *churchwarden* of the hamlet of *Atterton* in the parifh of *Wetherley*, in the county of *Leicefter*, and *J. Geary*, *overfeer* of the poor of the faid hamlet, by and with the confent of his majefty's juftices, &c. by thefe prefents do put and place *James Adie*, aged 14 years, a poor child of the faid parifh, apprentice to *J. Bazley* of the parifh of *Hinckley*, in the county of *Leicefter*, frame-work knitter, with him to dwell and ferve, &c. until the faid apprentice fhall accomplifh his full age of 21 years according to the ftatute, &c.: and fo it proceeded in the common form; concluding with covenants by *Bazley* to the faid churchwardens and overfeers, and every of them, &c. and their fucceffors, to inftruct the apprentice in his trade, and fo to provide for the faid apprentice that he be not a charge to the faid hamlet, &c. In witnefs, &c. (Signed,) *W. Sketchley*, *J. Geary*, and *J. Bazley*; and the confent of the two juftices to the indenture was in the ufual form. No other evidence was produced either on the part of the appellants or of the refpondents. And the queftion was, Whether the indenture of apprenticefhip were a valid inftrument or not, being made and executed by *one* churchwarden and *one* overfeer only?

The *Attorney-General*, *Reader*, and *Morice*, in fupport of the order, ftated fhortly that there was nothing upon the face of the indenture which fhewed that it could not have been executed by a competent authority. There might have been another overfeer, and the one overfeer and the churchwarden who executed the indenture would

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be a majority of the three, which is all that the statute (*a*) requires. And they referred to *Rex* v. *Besland* (*b*), where an order of appointment of one overseer was held good, upon an intendment that one other at least might have been appointed by another order. Or two might have been appointed for the township, of whom one only might be living at the time of executing the indenture.

Reynolds and *Halbeche* contrà, after noticing that this was an indenture executed by the officers of a *township*, objected that there could be no *churchwarden* of a *township* (*c*); but if the churchwardens of the parish at large were empowered to act with the overseers of each township which maintained its own poor separately, then as the stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 21. expresly directs *two* or more overseers to be appointed for every such township, in neither way of considering the case could one overseer or one churchwarden be a majority of the legal number of officers necessary to concur in the act; for *one* overseer could not be a majority of *two*, supposing that the churchwardens of the parish at large cannot act with the overseers of townships within it: or if they can, yet as by the 89th canon of 1603 (*d*), there must be two churchwardens; the one chosen by the minister, and the other by the parishioners, unless there be a custom shewn

(*a*) 43 *Eliz.* *c.* 2. *s.* 5.

(*b*) 1 *Burr.* 446. *n.* 1 *Const*, 15. and 1 *Wils.* 128.

(*c*) Vide *Rex* v. *Clifton*, 2 *East*, 168. where this question was discussed but not decided. The stat 17 *Geo.* 2. *c.* 38. speaks throughout of *churchwardens and overseers* of the parish, *township*, or place: and *s.* 15. enacts that overseers of the poor within every township or place where there are no churchwardens shall execute all the same powers as churchwardens and overseers may do by that or any former statute as to parishes; and 13 & 14 *Car.* 2. *c.* 12. as to townships.

(*d*) Vide 1 *Burn's Eccl. L.* 370. tit. *Churchwardens*, art. 3.

to

1810.

The King against The Inhabitants of Hinckley.

to the contrary (*a*); one churchwarden and one overseer cannot be a majority of the four. In *Rex* v. *Clifton* (*b*), an appointment of one overseer alone for a township was held to be bad; and a certificate of the settlement of a pauper in the township signed by him alone was on that account held invalid. It is true that the fact of there being more than one overseer for the township was negatived by the case; but the Court proceeded upon the construction of the statute 13 & 14 *Car.* 2. So in the *King* v. *St. Margaret, Leicester* (*c*), where one of two churchwardens of a parish was also appointed sole overseer, a certificate signed by the two was held to be void, and did not prevent a settlement being gained in the certificated parish by an apprentice of the certificated man. In case of the death or removal of an overseer before the expiration of his office, power is given (*d*) to the justices to appoint another in his stead; and therefore the intend-

(*a*) I do not find any instance stated in Dr. *Burn* of a custom to have only *one* churchwarden in a parish; all the cases of exceptions to the canon are as to the right of electing or appointing *one* of the two or both. There is indeed an instance in *Warner*'s case, *Cro. Jac.* 532, of a custom in the parish of *All Hallows*, in *London*, for the parishioners to elect annually out of a certain description of persons one to be churchwarden, who was to continue for that and the succeeding year, the same person being called Upper Churchwarden one year and Under Churchwarden the other: but still there were always two co-existing churchwardens. And Dr. *Burn* afterwards * cites *Gibs.* 215. to this purpose, that "although in some places there is but one new churchwarden yearly elected (he who was junior churchwarden before being continued of course,) yet in that case the books of common law as well as the canon suppose a new election to be made of *both*." *Qu.* Whether there be any instance in fact of a custom for one churchwarden only to be appointed by a particular *township* maintaining its own poor separately from the rest of the parish, to act with the overseers of that township in all its local and separate interests, and with the other churchwardens in all matters of general concern within the parish at large.

(*b*) 2 *East*, 168. (*c*) 8 *East*, 332. (*d*) 17 *Geo.* 2. *c.* 38. *f.* 3.

* Page 379, art. II.

1810.

The KING against The Inhabitants of HINCKLEY.

ment of an original appointment of two, and the death of one, before the indenture was executed, will not help the case. Then if the indenture were void for want of proper parties, no settlement can be gained by serving under it, according to *Rex* v. *Hamstall Ridware* (a).

Lord ELLENBOROUGH C. J. No evidence having been given to impeach the validity of this indenture by shewing that it was executed by less than a majority of the proper officers charged with that duty, the validity of it must be tried by itself: and if any intendment can by law be made to support it, we must make that intendment. Now if there were two existing overseers at the time, and only one churchwarden, the two who executed the indenture, being a majority, would be sufficient to bind the apprentice. Then can there be by law only one churchwarden? That may be regulated by custom, and by custom there may be only one in this place; therefore the party who impeached the indenture should have given evidence to rebut the intendment which may be made in support of it while unimpeached by evidence.

LE BLANC J. The indenture was produced on one side, and there was no evidence to impeach it on the other. The question then is, Whether by any intendment of law such an indenture can be good? And it may be good by intendment in the way put by my Lord. Then not being impeached by evidence, it stands good.

The other Judges concurring,

Orders confirmed.

(a) 3 *Term Rep.* 380.

Thursday, May 24th.

The KING *against* The Justices of LANCASHIRE.

An application under the highway act, 13 *G*.3. *c* 78. *s*. 47. for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, before any material change of inhabitants: and this Court refused a mandamus to the justices to make such rate after an interval of eight years, though applications had been from time to time made to the magistrates below in the interval, who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted, the onus of repair being thrown by immemorial custom on an interior district; and though so lately as the year before this application, the magistrates had ordered an account to be taken of the quantum expended upon the repairs out of the money levied.

AN indictment was found at the sessions at *Lancaster*, in the Spring of 1801, against the inhabitants of the parish of *Eccles*, for not repairing a certain road lying in the hamlet of *Higher Irlam* in that parish, which consists of five townships maintaining their own poor separately, and has six churchwardens appointed by the inhabitants, who conduct the business of the parish at large. The affidavit on the part of the prosecutor stated, that on the finding of the indictment the churchwardens met together, and employed an attorney to defend it on behalf of the parish. But the affidavits in answer to the rule stated that the several townships were divided into different hamlets, and that *Barton-upon-Irwell*, one of the five townships, was divided into twelve hamlets; of which *Eccles*, *Barton*, and *Higher Irlam* were three; and that the several hamlets had immemorially been accustomed to repair each their own highways. That the other four townships did not interfere in the defence of the indictment; but that the churchwardens and overseers of the township of *Barton* undertook the defence of it, and employed the attorney for that purpose. In *Oct.* 1801, the inhabitants of the parish of *Eccles* were found guilty, and at the beginning of 1802 an estreat was issued against them by order of the sessions for 400*l.* for the repair of the road; which sum was levied on Mr. *Trafford* of the township of *Barton-upon-Irwell*, and on Mr. *Clarke* of the township of *Irlam*, both in the parish of *Eccles*; and the

money was paid into the hands of two persons named, to be laid out in the repair, and part was accordingly laid out, and the road repaired, and so certified to the magistrates. Immediately after which, application was made on behalf of Messrs. *Trafford* and *Clarke* to two justices acting for the division, for a rate on the parish of *Eccles* to reimburse them; and similar applications were afterwards made from time to time, but without effect; the magistrates refusing to interfere, on the ground that the verdict had been improperly obtained against the inhabitants of the parish at large; the road in question lying within the hamlet of *Higher Irlam*; which, in common with the other hamlets into which the parish was divided, separately repaired its own highways. After the death of one of the magistrates who had principally opposed the granting of the rate to reimburse, application was again made at the end of 1808 for the rate; and all the circumstances of the case were brought before the Sessions in *April* 1809, who then ordered an account to be taken of the money which had been expended on the road, and the balance remaining in hand of 148*l.* 17*s.* 10*d.* to be paid over to Messrs. *Trafford* and *Clarke*; but the justices refused to make any order for a rate to reimburse them the 251*l.* 2*s.* 2*d.* which they had paid.

The present application was for a mandamus to the justices of the county, commanding them at the next special sessions to be holden within the limit where the parish of *Eccles* lies, pursuant to the general highway act (*a*), to cause a rate to be made according to the form and manner therein prescribed for the reimbursing *J. Trafford*, Esq. and *S. Clarke*, administratrix of *R. Clarke*, the

(*a*) 13 *Geo.* 3. *c.* 78. *f.* 47.

1810.

The King *against* The Justices of Lancashire.

the monies levied on them for the fine imposed upon the inhabitants of the parish for the non-repair of the road.

Park now opposed the rule on two grounds; first, that the parish at large had no concern in the road in question; that the defence of the indictment had been undertaken by the township of *Barton*, who ought to have pleaded either their own liability or that of the particular hamlet; but who, by their own default, had suffered a verdict to pass against the parish when a good defence might have been made to it: and therefore the rate to reimburse ought to be made either against the inhabitants of the township or of the hamlet, whichever was bound to the repair of the road. And he referred to *The King* v. *Townshend* (a), where a parish consisting of two districts, which were bound to repair separately, having been convicted for not repairing a road in one of the districts; the other district not having had notice of the indictment; the Court considered it as substantially the conviction of the one district: and a fine having been levied on an inhabitant of the other, they granted a special mandamus for a rate to be levied on the district bound to repair the indicted part of the road. 2dly, He resisted the application on the ground of the length of time which had intervened since the levying of the money, during which a great change of the inhabitants must necessarily have taken place.

Scarlett and *Yates* in support of the rule said, that the case of *The King* v. *Townshend* must have proceeded on the ground of fraud; the inhabitants of the innocent

(a) *Dougl.* 421.

district

1810.

The King *against* The Justices of Lancashire.

district not having had any notice of the indictment; but here there was no pretence to say that the parish at large had not notice, whether the indictment were properly defended or not. [Lord *Ellenborough* C. J. When it was known that the roads were repairable separately by the different districts of the parish, it was a fraud in those who undertook to defend the parish against the indictment not to have put in a special plea to that purpose.] The reason why the general issue was pleaded in this case was, that the district disputed the fact of this being a *public* road, and it was not competent for the defendants to plead both the general issue and the special matter. In fact the evidence was much stronger that it was not a highway than that the particular district had been immemorially accustomed to repair all the highways within it, unless evidence had been admitted of the repair by each of the other districts of their own highways; of which doubts were at that time entertained upon the form of the special plea then commonly used; which was merely that the road in question lay within the particular district, and that such district was immemorially accustomed to repair it. Besides which it was doubted whether such a prescription applied to roads recently made or become public, or was confined to antient roads (*a*). But now another more comprehensive form of plea is in use, better adapted to let in all the evidence bearing upon the case; in which it is alleged that the parish is divided into certain districts, and that each of those districts is immemorially accustomed to repair all the public roads within it (*b*).

(*a*) Vide *Rex* v. *The Mayor, &c. of Liverpool*, 3 *East*, 86. and *Bower's* argument in *Rex* v *Sheffield*, 2 *Term Rep.* 109.

(*b*) Vide *Rex* v. *Bridekirk Parishioners*, 11 *East*, 304. for an instance of such a plea; though that was held bad upon a special objection of another sort

1810.

The KING against The Justices of LANCASHIRE.

[Lord *Ellenborough* C. J. said, he remembered a plea of that description to an indictment against a parish (*a*) in the county of *Cumberland* while he was at the bar.] At any rate, if there be any doubt as to the right of the parties applying to obtain the particular relief prayed for, the justices may return the special matter to the writ. They then observed as to the delay of the application; that the indictment was only in 1801, and it was some time after before the money was levied and laid out; after which Mr. *Clarke* died, and applications had been made to the justices from time to time, which shewed that the claim was not meant to be abandoned. And as to a change of inhabitants having intervened, that must always happen in the nature of the thing, even where the greatest possible expedition is used, which is never required in cases of this kind.

Lord ELLENBOROUGH C. J. This is an application to the discretion of the Court, to shift a burthen from these parties, on whom it has been innocently, perhaps, but certainly negligently, fixed, and to put it upon others who are also innocent of the charge. And though applications of this sort have been entertained; yet that must be understood of such as were recently made after the occasions which gave rise to them. But what perverse justice it would be to grant such an application after an interval of eight years, when a large proportion of the inhabitants must have been changed. Suppose an action of assumpsit could have been brought in such a case for the contributory shares of the other inhabitants, the statute of limitations would have run upon it: but if this

(*a*) Qu. *Dalston* was mentioned

application

application be granted, the money must be paid under the rate. The length of time therefore which has elapsed is a sufficient answer to the application, without going more at large into the subject.

GROSE J. Nothing could be more unjustifiable than to put the defendants to the expence of making a special return to the writ, when the granting it at all would be unjust.

LE BLANC J. The lateness of the application is a sufficient answer to it: it ought to have been made recently after the occasion: and it is no answer to the objection that the parties waited till the money had been laid out, and all the accounts were made up. Those who were obliged to pay the money in the first instance ought to have applied within reasonable time for reimbursement, and not have waited till a great change had taken place in the body of the inhabitants who were to contribute to it.

BAYLEY J. agreed

Rule discharged.

1810.

Thursday, May 24th.

VINCENT, one, &c. *against* SLAYMAKER.

A party in a cause having changed his attorney in the progress of it, a Judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the stat. 2 *G.* 2. *c.* 23 *f.* 23 which delivery was accordingly made to the second attorney in the cause: held that this was a sufficient delivery *to the party to be charged therewith*, within the words and meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill.

THIS defendant in the year 1808 had employed the plaintiff as his attorney in an action brought by him against *Hearn* and another, and in the progress of that cause the now defendant changed his attorney, and employed Messrs. *Rogers*, his present attornies; and thereupon a Judge's order was obtained, intitled "*Slaymaker* against *Hearn, and Another*;" whereby, "Upon hearing the attornies or agents on both sides, and by consent, it was ordered that Mr. *Vincent*, the plaintiff's late attorney, should deliver to Messrs. *Rogers*, the plaintiff's then present attornies, on or before the next day of *Hilary* term, a bill signed of his fees and disbursements in this and all other causes and matters wherein he hath been concerned for the said plaintiff. Dated 8th *Dec.* 1808." A bill was accordingly signed and delivered by Mr. *Vincent* to Messrs. *Rogers*: And afterwards the present action having been brought to recover the amount of that bill, objection was taken at the trial before Lord *Ellenborough* C. J. at *Westminster*, that the bill was not proved to have been "delivered *to the party to be charged therewith*, or left "for him at his dwelling-house or last place of abode," as is expressly required by the stat. 2 *G.* 2. *c.* 23. *f.* 23., one month or more before the action commenced. To which it was answered that a delivery to the attorney of the party of any thing within the scope of his authority in the cause is the same as a delivery to the party himself. But his Lordship thought that however the attorney of a party in a cause was for general purposes, connected with the subject-matter of the cause, to be considered the same

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as the party himself; yet that as the statute expresly required the delivery to be made *to the party to be charged with* the demand, the delivery which had been made to his attorney in this case was not a literal compliance with the act. And he said that he was fearful to depart in such a case from the letter of the act, not knowing how far implied deliverances might be carried beyond the meaning of the legislature. He therefore directed a nonsuit; which was afterwards moved to be set aside, in order to take the opinion of the Court upon the construction of the statute, whether the delivery of the bill to the client's then attorney under the Judge's order were a delivery to the client himself within the meaning of the act.

Garrow and *Park* now shewed cause against the rule, and stood upon the literal words of the statute, which they said was the only guide in matters of regulation of this kind. The legislature meant to prevent the client from being taken by surprize upon the demand of his attorney, and meant to secure to him a *personal* communication of such demand before any action commenced for it. If a communication to an agent would have answered their intention, they would doubtless have expressed it, as well as a delivery at the client's dwelling-house or last place of abode. But so strict has been the construction of the statute, that in *Hill* v. *Humphreys* (a) a delivery at the client's *counting-house*, where it was much more likely to have been seen by him, was held insufficient to satisfy the latter words of it. Here too the delivery was not made with a view to this action, but made in another cause, between other parties, for another purpose, and upon application to a Judge by the defendant's

(a) 2 *Bos. & Pull.* 343.

 then

1810.

VINCENT, one, &c. against SLAYMAKER.

then attornies Messrs. *Rogers*, who they admitted were his present attornies; but contended that that did not vary the question. [*Le Blanc* J. It was a delivery procured on behalf of the defendant for the purpose of having the plaintiff's bill taxed, in order that the amount might be settled.] It was done upon a change of attornies, and it did not appear that the taxed bill ever came to the hands of the client. [*Grose* J. Is it meant to be contended that the attorney is bound to make a personal delivery of his bill to the client? and yet that would also follow if the words are to be taken literally.] What is done by his order would be considered as done by him; but the case is different in respect of the person to whom the delivery is to be made where personal notice is required: as in the case of an attachment, personal service on the party is necessary to bring him into contempt; but the service of the rule need not be made in person by the other party.

Topping, *Marryat*, and *Puller*, contrà, maintained that all the beneficial purposes of the act had been answered by the delivery of the bill made to the defendant's attornies in this case; and applied the maxim, qui hæret in litterâ hæret in cortice, to the objection taken. If a delivery by the attorney's agent to the client satisfied the words and reason of the statute, so must a delivery to the client's agent having competent authority from him for that purpose. The act does not say that the delivery shall be made to the client *in person*, but to the client, generally; and the question upon that branch is, Whether a delivery to his attorney, having competent authority to demand and receive such a bill within the general scope of his employment, be not a delivery in law to the client himself.

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The case cited on the other branch is different; for a *counting-house* as such is not in law a *dwelling-house* or *place of abode*. This also differs from the case of process for contempt; for a man is not liable criminaliter but only civiliter for the act of his proper attorney. Then as to the delivery of the bill having been made in another cause and not in this; there never can be a delivery of it in the very cause, for it must be made before the action

Lord ELLENBOROUGH C. J. The question here is, Whether the act of parliament has not annexed as a condition to the bringing of this action by an attorney against his client for the recovery of his fees and charges, that his bill shall have been delivered a month before the action brought *to the party (himself) to be charged therewith*, or left at his dwelling-house or last place of abode? And I believe I am so unfortunate as to differ from my brothers upon the construction of the act, which diminishes my confidence in the opinion I had formed upon it. It strikes me that the object of requiring such a delivery was that the bill should be drawn under the client's own vigilant observation: and this was required not for the purpose of protecting the attorney making the delivery, but the party to whom the delivery was to be made: and that is an answer to the argument drawn from the sufficiency of a delivery made by the attorney's clerk or agent, in respect of which the words of the statute will admit of a larger interpretation than where it speaks of the delivery *to* the party who was meant to be protected. Now here the bill had been delivered under a Judge's order in another cause to the party's attorney in that cause; and for the purposes of that suit the party must

1810.

VINCENT, one, &c. *against* SLAYMAKER.

be taken to have reposed his confidence in his attorney for all matters arising within the scope of his employment after he was constituted such attorney: but it does not appear that he had extended his confidence further to all his former business. It sometimes happens that a person is general attorney for a mercantile house in the city, while another person acts as their particular attorney for a particular purpose; as in an action upon a certain policy: in such a case how could notice to the particular attorney bind his client for general purposes out of the particular suit for which he was retained. The client might only have desired to have his former attorney's bill in the particular cause then in progress, and the new attorney might without his client's authority or knowledge have taken out a Judge's order in larger terms, comprehending all former business which the first attorney had conducted for his client; and this is delivered to the new attorney: how is that notice to the client for general purposes not connected with that suit? Every man, it is true, is liable civiliter for the acts of his attorney, though not known to him; but that is only to the extent of the attorney's authority. The act meant to guard the client against collusion; for otherwise the two attornies might collude to avoid the taxation of the bill by these means. I do not therefore consider that all the beneficial purposes of the act will be secured by letting in such a constructive delivery as was set up in this case.

GROSE J. I leant at first to my lord's construction of the act; thinking that if one part of the clause was construed strictly, all the words of it ought to be so construed, and that there must be a personal delivery of the bill to the client: but upon further consideration I think

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that all that the legislature meant to require was, that a month at least before the action brought the bill should be delivered by the attorney or his agent to the client or his agent; so that the client might have reasonable notice of the demand, to have the bill taxed, or advise with others upon it. And if the attorney to whom the bill was delivered under the Judge's order in this case did not communicate it to his client, the client would have his remedy by action against the attorney to recover damages for what he had suffered by the neglect. I think therefore that the maxim does apply in this case, qui hæret in literâ hæret in cortice; and that the legislature, by requiring a delivery of the bill to the party, meant no more than that he should have reasonable notice of its contents; leaving it to the construction of law, as in other cases, what should be deemed a delivery to him for the purpose of notice.

1810. VINCENT, one, &c. against SLAYMAKER.

LE BLANC J. It appears to me that this delivery of the plaintiff's bill to the attorney of the party at the time is a delivery to the party within the meaning of the act. The strong argument against it is founded on the literal meaning of the act, requiring that no attorney shall commence any action for the recovery of any fees, &c., until one month or more after he shall have delivered *unto the party to be charged therewith*, or left for him at his dwelling house or last place of abode, a bill of such fees, &c. But in construing these words we must look to the object of the act, which was not to put an attorney in a more difficult situation than any other person, in respect to the manner in which such delivery should be made, by confining him to make a personal delivery of the bill to his client, or otherwise to leave it

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1810.

VINCENT, one, &c. against SLAYMAKER.

at his dwelling-house; but the object was to give proper notice of the demand to the client; and as the nature of the business done, and the charges for doing it, could more properly be judged of by the officers of the court than by the party himself, to enable him before he could be sued for the amount, to have the bill taxed, and to give him an opportunity of putting it into the hands of some professional man for that purpose. Now here the defendant having changed his attorney in the progress of a former action brought by him against other parties, a Judge's order for the delivery of the plaintiff's bill was applied for and obtained by his present attorney, who had been his former attorney; which bill was accordingly delivered to his then attorney; and the question is, Whether such a delivery to the attorney of the defendant be not in construction of law a delivery to himself? and I think it is. If the defendant had sent a note to the plaintiff by another person desiring him to deliver his bill to the bearer, a delivery to that person must, I conceive, have been deemed sufficient: for if a man who is entitled to receive a certain thing puts another in his place for the purpose of receiving it, it is a waver of the personal delivery contemplated to be made to himself. Then it is the same thing here where the delivery has been made to the person whom he had appointed to be his attorney in the conduct of the cause in the place of the plaintiff whom he had dismissed. The force of the argument here is, that the new attorney might have been appointed attorney for a particular purpose, but not for general purposes, and he might have done this unknown to his client, and might not have put the bill in a course of taxation, by which the defendant will have been deprived of the benefit of the act: but I think the answer is, that when the

the defendant constituted him his attorney, it was for all the proper purposes of an attorney so constituted; and his attorney obtaining the Judge's order must be taken to have been for the purpose of enabling his client to have the bill taxed; for the order is to deliver a *bill signed*, that is, in order that the attorney might be bound by it; and when delivered, the party may get an order for taxing it. Then shall the attorney be bound by this delivery so obtained under a Judge's order, and the client be enabled to have it taxed? and shall not the attorney have the benefit of it as a bill delivered against the client? Then suppose the client had, as he must have done, after the order to tax the bill, entered into an undertaking in the Master's books to pay so much as should appear due on the taxation; could he, after having so recognized, by signing the book, the act of his attorney in procuring the bill to be delivered, have objected that it was not delivered to him? It appears therefore to me, that the client, having appointed his attorney, has put him in his place for this purpose, and has thereby dispensed with that delivery to himself which the act would otherwise have required.

BAYLEY J. On the best consideration I can give the question, but feeling nevertheless the weight of my Lord's reasons, I think the delivery of the bill to the client's attorney in the cause was sufficient. The act does not say that the delivery shall be to the client in person, but leaves that at large according to what shall be deemed a delivery to the party in point of law; and then by the general rule of law, a delivery to an agent authorized to receive it is a delivery to the party himself. The attorney is indeed the person to whom the bill would be regularly

1810.

VINCENT, one, &c. against SLATMAKER.

regularly delivered for this purpose. The object of requiring the delivery is to have the bill taxed, and therefore the party would naturally employ an attorney for the purpose. If such a delivery was not sufficient to enable the attorney to maintain an action for his bill, he would have a fair right when an order was taken out to compel a delivery of it, to have such order restrained to a delivery to the party himself; for he might well object to making a delivery which would be good against himself, but not available as a delivery for any purpose in his favour. It is said that the defendant might not know that Rogers, his attorney, took out any order for this purpose: but the client must be taken to be cognizant for civil purposes of every step taken by his attorney in the cause; and if a delivery to a special agent would suffice, then a delivery under a Judge's order to the attorney, who is the party's agent in the cause for all matters within the scope of his employment as attorney, is primâ facie evidence, at least, that the attorney was authorized to take out such order by his client, and throws it upon the client to shew that his attorney had no such authority.

Rule absolute.

DAVIDSON *againſt* GWYNNE.

Friday, May 25th.

THE plaintiff declared in debt on a charter party of affreightment, made at *London* on the 17th of *October* 1808, between himſelf, as maſter, and the defendant, as freighter of the brig *Pomona*, then in the river *Thames*; whereby the maſter covenanted with the freighter that the brig being tight, &c., and properly fitted, victualled, and manned for the voyage hereinafter named, ſhould be *at the diſpoſal and direction of the freighter, his agents and aſſigns* for 3 calendar months certain, and longer if required for the voyage, under the following covenants: viz. That the maſter ſhould immediately load at *London* ſuch goods as the freighter thought fit, and being diſpatched, ſhould immediately (wind and weather permitting,) proceed and join the *firſt* convoy that ſhould ſail after ſhe ſhould be ſo loaded from *England* for *Spain* and *Portugal*, or either,

Where the maſter of a veſſel covenanted with the freighter, (inter alia) that the veſſel ſhould proceed with the *firſt* convoy from *England* for *Spain* and *Portugal*, or either, *as he ſhould be directed by the freighter or his agents*, and there make a *right and true delivery of the cargo* agreeably to the bills of lading ſigned for the ſame; and ſo take in a home cargo, and return and make *a right and true delivery* thereof at *London*, &c. *In conſideration whereof, and of every thing above mentioned*, the freighter covenanted (inter alia) to load the veſſel out and home, and pay certain freight per ton *per month*, part before, and the remainder *on the right and true delivery* of the homeward cargo at *London*: held,

1. That the freighter having firſt ordered the maſter to proceed to *Liſbon*, in conſequence of which the maſter had taken in goods and ſigned bills of lading for that port, could not afterwards countermand that order, and order him to proceed to *Gibraltar*, without firſt recalling the bills of lading, or at leaſt tendering ſufficient indemnity to the maſter againſt the conſequence of his liability thereon.

2. But, ſuppoſing the freighter had ſuch a power, yet his ſupercargo and agent, who was on board the veſſel, had the like authority in the abſence of his principal, even before the veſſel ſailed from this country, to alter again the deſtination to *Liſbon*.

3. That the maſter having proceeded with the outward cargo to *Liſbon* under the firſt order, and brought home a return cargo, and delivered the ſame to the freighter at *London*, was entitled to his freight for that voyage, though he had not ſailed with the *firſt* convoy; the ſailing with the *firſt* convoy not being a *condition precedent* to his recovering freight for the voyage actually performed under the firſt order, but a diſtinct covenant, for the breach of which he was liable in damages.

4. And he was entitled to recover ſuch freight as upon *a right and true delivery of the cargo, agreeably to the bills of lading*, upon proof of having delivered the entire number of cheſts, &c. for which bills of lading had been ſigned, though it appeared that the contents of the cheſts of fruit were damaged by the negligence of the maſter and crew on board, in not ventilating them ſufficiently: the party injured having his counter remedy by action for ſuch negligence.

and

1810.

DAVIDSON *against* GWYNNE.

and should therewith proceed to any port or ports in *Spain* and *Portugal*, or either, *as he should be ordered by the said freighter, his agents or assigns*, and at any or either of such port or ports as he should be ordered as aforesaid should make *a right and true delivery of the whole of the said outward goods, agreeably to bills of lading that should have been signed for the same*; and having completed such delivery, should load at any port or ports in *Spain* and *Portugal*, or either, as he should be directed by the freighter, his agents or assigns, such goods as the said freighter, his agents or assigns, should think fit, and return therewith to *London*, and *there make a right and true delivery of the whole of the homeward goods*, agreeably to the bills of lading; (the act of God, the king's enemies, restraint of princes, fire, and the dangers of the seas, &c., excepted.) Also, *the master thereby agreed to receive on board the said brig at* London, *two supercargoes to be appointed by the freighter*, and to convey them as cabin passengers to *Spain* or *Portugal*, or either, and back to *London*, free of passage-money. In consideration whereof, and of every thing above mentioned, the freighter covenanted that he, his executors, &c., agents or assigns, would employ the said brig under the conditions aforesaid, and would load the outward cargo and discharge the same in *Spain* and *Portugal*, or either; and would in *Spain* and *Portugal*, or either, load the homeward cargo and discharge the same at *London*; and would pay to the commander in full for the freight of the said vessel for the voyage aforesaid, at the rate of 1*l.* 10*s.* per ton per month from the 5th of *October* 1808, until the delivery of the homeward cargo at *London*; part of the freight to be paid before the brig left *London*, &c., and the remainder *on the right and true delivery of the homeward cargo at*

10 London:

1810.

DAVIDSON against GWYNNE.

London. And to the true performance of *all and every* the foregoing covenants on the part and behalf of the said parties respectively, they bound themselves, their heirs, executors, &c., each to the other *in the penal sum of* 4000*l*. And by a memorandum at the foot of the charter-party it was agreed, that in case the freighter or his assigns should think proper to remove the brig to any other port than that in which she should have first arrived for the purpose of discharging her cargo, then he should pay all port-charges and pilotage arising therefrom. The plaintiff then averred *that he was ordered by the freighter to proceed with the said brig to* Lisbon *in* Portugal; and thereupon the said brig being tight, &c. and properly fitted, victualled, and manned for the said voyage, the plaintiff immediately received on board her at *London* such goods as the freighter thought fit to load, *and being dispatched, sailed with convoy* (not saying with the *first* convoy) from *England* to *Lisbon*, and there made *a right and true delivery of the whole of the outward cargo agreeably to the bills of lading* that had been signed for the same; and that the plaintiff, having completed such delivery afterwards took on board the said brig at *Lisbon* such goods as the freighter thought fit, and returned therewith direct to *London*, where he made *a right and true delivery of the whole of the homeward cargo*, agreeably to the bills of lading signed for the same: and then he averred that the freight amounted at the rate agreed upon by the charter-party to 1050*l*. &c.

The 2d count was general, for so much money due for freight, &c. A third was for the use and hire of the vessel; and there were other common counts.

The defendant pleaded several pleas to the first count, 1. That after making the charter-party, the plaintiff as master

1810.

D. VIDSON *against* GWYNNE.

master took on board the brig at *London* a cargo loaded by the defendant, as freighter, and was therewith dispatched and ordered by the freighter immediately to proceed and join the *first convoy* that should sail from *England* for *Portugal*, and to make a delivery of *the whole* of the said outward cargo, agreeably to bills of lading signed for the same, at *Lisbon*: and that after the brig was so loaded, the *first* convoy sailed from *England* for *Portugal*, to wit, from *Portsmouth* to *Lisbon*, whereof the plaintiff had notice: yet, though neither wind nor weather prevented the same, the plaintiff did not proceed and join such *first convoy*, but neglected so to do. 2dly, That after the master had been ordered by the freighter to proceed to *Lisbon*, and after the brig was dispatched, and had sailed from *London*, and before her arrival at *Lisbon*, *the defendant, as freighter, countermanded the said order* so by him given to the plaintiff to proceed in the said brig to *Lisbon*, and ordered him not to proceed with it to *Lisbon*, *but to proceed therewith to* Gibraltar *in* Spain, and there to make delivery of the cargo: yet the plaintiff, though wind and weather permitted, did not proceed to *Gibraltar*, but refused so to do. 3dly, The defendant, *protesting* that the plaintiff was not ordered by him, the freighter, to proceed with the brig to *Lisbon*, pleaded that after she was dispatched and had sailed from *London*, and before her arrival at *Lisbon*, the defendant, as freighter, ordered the plaintiff to proceed with her to *Gibraltar*, and there make delivery of the cargo: and then it alleged a breach of this last-mentioned order. 4thly, That though the plaintiff took on board the brig at *Lisbon* the goods mentioned in the first count, and returned therewith to *London*; yet the plaintiff did not then make *a right and true delivery of the whole* of the home-

 ward

1810.

DAVIDSON *against* GWYNNE.

ward cargo, agreeably to the bills of lading signed for the same. 5thly, that though the plaintiff took on board the brig at *Lisbon* the said goods, &c., and though the goods were shipped on board her in good order and well conditioned, and though the plaintiff thereupon signed bills of lading in respect of the said goods, and thereby undertook to deliver them to the defendant or his assigns *in like good order and well conditioned* at *London*, (the dangers of the seas only excepted,) and though the plaintiff did return with the said goods to *London*, and delivered the same there to the defendant; yet the plaintiff did not there deliver the goods to the defendant *in like good order and well conditioned as the same were in when shipped on board the said brig*, but in a much worse order and condition, and in a damaged and injured state *occasioned by the negligence of the plaintiff and his servants* in the course of the voyage, whilst the goods were on board the brig, and not by the dangers of the seas, &c.: *without this*, that *the plaintiff did make a right and true delivery of the whole of the said homeward goods, agreeably to the bills of lading* which had been signed for the same, in manner and form as alleged in the first count. And to the general counts in the declaration the defendant pleaded nil debet.

To the first and third pleas the plaintiff demurred generally. To the second he replied, that after the defendant had countermanded the order given by him to the plaintiff to proceed with the brig to *Lisbon*, and had ordered the plaintiff not to proceed to *Lisbon*, *the defendant again ordered the plaintiff to proceed with the brig so loaded to* Lisbon, *and there make delivery of the said goods* according to the charter-party. To this plea the defendant rejoined; traversing, that after he had countermanded the order to proceed in the brig to *Lisbon*, as in the 2d plea mentioned,

1810.

DAVIDSON *against* GWYNNE.

mentioned, he again ordered the plaintiff to proceed with her to *Lisbon*, and there make a delivery of the cargo, as stated in the replication: on which issue was joined. On the 4th plea issue was also joined. To the 5th the plaintiff replied, as before, that he did make a right and true delivery of the whole of the said homeward goods, agreeably to the bills of lading signed for the same, in manner and form as alleged in the first count of the declaration: on which issue was joined. And issue was also joined on the nil debet pleaded to the common counts.

At the trial of the issues certain questions arose, which were brought in discussion before the Court on a rule for a new trial moved for at the beginning of the term, and which was disposed of on this day after the argument on the demurrers.

Taddy, in support of the demurrer to the first plea, contended that the sailing with the *first* convoy was not a condition precedent to the plaintiff's right to recover freight, as set up in defence by the first plea; the voyage having been performed, and the outward and homeward cargoes delivered to the freighter's orders. He referred to the rule laid down in *Boone* v. *Eyre* (a), and recognized in *Hall* v. *Cazenove* (b), that where mutual covenants go only to *a part of the consideration* on both sides, where a breach may be paid for in damages, there the defendant has a remedy on the plaintiff's covenant, *and shall not plead it as a condition precedent*: and likened this to *Constable* v. *Cloberie* (c), cited by *Lawrence* J. in *Hall*

(a) *B. R., E* 17 *Geo* 3. 1 *H. Blac.* 273. *n.* and in *Campbell* v. *Jones*, 6 *Term Rep.* 573.

(b) 4 *East*, 484. (c) *Palm.* 397.

v. *Cazenove*,

v. *Cazenove*, where the covenant being to fail with the *next* wind upon a certain voyage, the defendant traverfed that the fhip did fail with the next wind; which was over-ruled upon demurrer, as immaterial againft a demand for freight after the voyage performed. And he alfo referred to *Havelock* v. *Geddes* (*a*), the laft reported cafe on the fubject of a condition precedent in a charter-party, to the fame effect. [Lord *Ellenborough* C.J. then faid, that the Court would hear from the defendant's counfel, whether this cafe were diftinguifhable from thofe cited, where the queftion had been fully confidered.] Secondly, he contended upon the demurrer to the third plea, that fuch plea was clearly bad: it did not deny that the plaintiff was ordered by the defendant as freighter to proceed with the brig to *Lisbon*, as ftated in the declaration; for a proteftation of that fact is no denial of it; but it avers that he was ordered by the freighter to proceed to *Gibraltar*. Now the fecond order is not inconfiftent with the firft, nor any countermand of it; but as the pleadings ftand, the plaintiff might have been ordered to go to both places; and the breach of the laft order is no anfwer to a demand of freight for the performance of the firft. [Lord *Ellenborough* C. J. Unlefs the firft order be contradicted by the fecond, we will make the two orders confiftent if poffible; and there being no incompatibility upon the face of them, they may well ftand together.

Lawes, contrà, upon the fecond queftion, attempted to fhew that the latter order was incompatible with the firft, as it directed the brig to proceed to a different

(*a*) 10 *Eaft*, 555. 562.

1810.

DAVIDSON *against* GWYNNE.

place, which necessarily superseded the original destination. [Lord *Ellenborough* C. J. Supposing there had been a written order to proceed to *Lisbon and Gibraltar*, would not that order have sustained the allegation in the declaration?] The captain was to go to such port or ports in *Spain* or *Portugal* as he should be ordered by the freighter: this resolves itself into a condition precedent; for if the captain have disobeyed that order, he has not performed the voyage contracted for: the performance of part only may have frustrated the whole intention of the voyage. [*Le Blanc* and *Bayley*, Justices, observed, that the freighter and his agents had accepted the goods at the port where they were discharged, and therefore could not now make that objection.] The delivery was substantially different from that contracted for by the charter-party: and therefore, though the plaintiff might sue for freight in another action, he cannot recover upon this charter-party [*Bayley* J. He signed bills of lading for *Lisbon*, under the freighter's order, by which he bound himself to deliver the goods there to the consignees.] That might give him a remedy against the freighter, who by his act subjected him to such a responsibility, for a loss thereby occasioned: but still, if after that the freighter thought proper to alter the destination of the voyage, the captain was bound by his charter-party to comply with the subsequent order. Upon the other point, he argued from the terms of the contract and the apparent intention of the parties, that the sailing with the *first* convoy was a condition precedent, and not an independent covenant: it might be an object of the first consequence to the success of the adventure; and the freight was to be regulated by time, and therefore it was material that the voyage should be performed as speedily

as required by the contract. [Lord *Ellenborough* C. J. That only goes to the question of damages; but is there any thing in that which goes to the whole consideration?] The freight is covenanted to be paid in consideration of every thing before mentioned, of which the sailing with the first convoy is one.

Lord ELLENBOROUGH C. J. It is useless to go over the same subject again, which has been so often discussed of late. The sailing with the *first* convoy is not a condition precedent: the object of the contract was the performance of the voyage, and here it has been performed. The principle laid down in *Boone* v. *Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. It is useless to repeat all the cases, because we had the subject so fully before us very lately in *Ritchie* v. *Atkinson* (*a*), and in the other cases mentioned. Then upon the other plea; the question is whether, the ship having been first ordered to proceed to *Lisbon*, and goods loaded, and bills of lading signed by the plaintiff for that port, a subsequent order given by the freighter to go to *Gibraltar* be a bar to the plaintiff's claim for the freight out to *Lisbon* and back again to *London*. Now after the freighter's order to the captain to go to *Lisbon*, and the latter had received on board goods and executed bills of lading for that place, it was not competent for the freighter to countermand

(*a*) 10 *East*, 295.

1810.

DAVIDSON *against* GWYNNE.

that order; he could not capriciously change the destination of the vessel, without recalling the bills of lading, or at least offering sufficient indemnity to the captain against them. But nothing of that sort is stated. The case then stands thus, that the freighter, after giving an order to the captain to go to *Lisbon*, and suffering him to bind himself by signing bills of lading to deliver goods there, gives him another order to go elsewhere, and make himself liable to actions for the breach of engagement upon all those bills of lading. This the freighter had no right to do; and therefore the breach of that subsequent order affords no bar to the plaintiff's claim for freight for the voyage which he prosecuted under the first order, and to the prosecution of which he had bound himself by the bills of lading before he received such second order.

GROSE J. The cases of *Boone* v. *Eyre*, and *Ritchie* v. *Atkinson*, and all the others which have been mentioned, determine the first question, that the sailing with the first convoy was not a condition precedent, but one of several mutual covenants: and if either of the parties broke his covenant, the other might bring his action for it: but the plaintiff's right to freight was not to depend upon that. As to the other question; after the first order given to go to *Lisbon*, under which goods had been received on board and bills of lading signed, by which the master made himself liable to answer in damages to the owners of the goods if he did not carry them according to his undertaking, it cannot be permitted to the freighter to countermand the voyage, and make the master liable to actions by those to whom he had so bound himself.

LE BLANC

LE BLANC and BAYLEY, Juſtices, agreed in awarding judgment for the plaintiff on the demurrers.

The report of the evidence on the rule for a new trial was afterwards read; when it appeared that after the *Pomona* was chartered ſhe took in her cargo for *Liſbon* by order of the defendant, and the plaintiff ſigned bills of lading accordingly for that port. She cleared out and left the river *Thames* on the 31ſt of *October* 1808, and arrived at *Portſmouth* to join convoy on the 1ſt of *November*, and on the 7th received ſailing inſtructions from the convoy. The fleet afterwards waited at *Spithead* for a wind till the 29th, when they ſailed; but the *Pomona* miſſed the convoy, and was obliged to bring up again in *Lymington* road on the 1ſt of *December*, and while ſhe was lying there the defendant came from *London*, and told the plaintiff that inſtead of going to *Liſbon* he ſhould go to *Gibraltar*. The plaintiff objected, that he was bound by the charter-party, by his bills of lading which he had ſigned, and by his clearance, to go firſt to *Liſbon*, and he had alſo three cabin paſſengers for *Liſbon*; and after the defendant's departure and return to *London*, the plaintiff repeated his objections to *Stout*, the defendant's agent and ſupercargo, who ſtill urged the plaintiff to go to *Gibraltar*; and the plaintiff declared that he would not go to *Gibraltar* without a written order from *Stout*, which the latter then gave him; but a few days afterwards *Stout* required the written order to be returned to him, which he tore in pieces, not chuſing to take a perſonal reſponſibility on himſelf, as the plaintiff refuſed to go to *Gibraltar* without ſuch written order. And there was other evidence on the part of the plaintiff, of *Stout*'s having finally agreed that the plaintiff ſhould proceed to *Liſbon*. But *Stout* him-

1810.
DAVIDSON against GWYNNE.

self, who was examined as a witness, swore that though he had no objection personally to the plaintiff's going to *Lisbon*, yet he had never given the plaintiff to understand that it was *Gwynne's* order, but the contrary. The *Pomona* afterwards sailed with another convoy and fleet on the 17th of *December*, and arrived in the *Tagus* on the 22d; and after discharging the outward cargo at *Lisbon*, and taking in there a homeward cargo, for which bills of lading were signed by the plaintiff, she sailed on her return to *London*, and arrived there on the 29th of *March*, and delivered her homeward cargo. It appeared also that the cargo, consisting of chests of oranges, was in a good condition when shipped at *Lisbon*; but on the *Pomona's* arrival at *London*, it was found when unpacked to be much heated and damaged; and this was made out in evidence to have been occasioned by the negligence of the master and crew in not having given it sufficient ventilation during the voyage. The deterioration was from 10*s*. to 20*s*. a chest.

On these facts it was contended, that the plaintiff was not entitled to recover upon this charter-party: first, because the destination of the vessel was altered from *Lisbon* to *Gibraltar* by the freighter before her sailing, which was a countermand of the first order; and that therefore the voyage to *Lisbon* was not performed under the charter-party. And further, that what passed between the master and *Stout*, after the departure of the defendant from *Lymington* Road, was no authority for resuming the original destination to *Lisbon*, even if a supercargo had authority, especially while the ship remained at home under the control of the freighter himself, to issue any order in contradiction to the express order of the freighter himself; which

which authority was ſtrenuouſly denied. To this it was anſwered, that ſuppoſing the freighter himſelf had authority to alter the deſtination of the ſhip, after bills of lading ſigned by the maſter to deliver under the firſt order; which was denied; yet the ſupercargo in the abſence of his principal had authority to revoke that order, in the ſame manner as the principal freighter himſelf; and that the circumſtances ſtated amounted to ſuch revocation. 2dly, it was objected, that the homeward cargo having been damaged and in part ſpoilt while on board by the negligence of the maſter and crew, the plaintiff had not made *a right and true delivery* of the whole of the goods as ſtipulated by the charter-party, *agreeably to the bills of lading*, by which he undertook to deliver the ſame in like good order and well conditioned as when ſhipped on board; and therefore that the defendant was entitled to a verdict on that iſſue. To which it was anſwered, and Lord *Ellenborough* C. J. ruled accordingly, that the allegation of having made a right and true delivery of the cargo was ſatisfied by the delivery made of the number of cheſts of fruit ſhipped on board; and that if the contents of any of them turned out to have been damaged by the negligent ſtowing or ſubſequent want of care and proper ventilation by the maſter and crew, the defendant had a croſs action to recover damages; but that it was no anſwer to an action for the freight. Though his Lordſhip intimated further at the trial, that if there had been any ſpecial proviſion in the bills of lading for the care or againſt the negligence of the maſter and crew, the iſſue on the 4th ſpecial plea might have let the defendant into the proof of the negligence: but the iſſue being general on the fact of *a right and true delivery of the goods according to the bills of lading*, it was to be taken

in

1810.

DAVIDSON *against* GWYNNE.

in a narrow and reſtrained ſenſe, ſuch as in his own experience it had always received, as meaning a right and true delivery of the entire number of cheſts or packages ſhipped on board, as ſpecified in the bills of lading. Upon the other point his Lordſhip left it to the jury, whether in point of fact *Stout* the ſupercargo had ultimately concurred with the maſter in the original deſtination of the veſſel to *Liſbon;* reſerving for future conſideration whether he had authority ſo to do; ſuppoſing, which was a queſtion for the opinion of the Court in Bank upon another part of the record, that the freighter himſelf had authority to change the original deſtination of the voyage at that period and under the circumſtances of the caſe. And the jury upon the whole found a verdict for the plaintiff.

Garrow on a former day of this term moved for a new trial upon both the points, which had been made at the trial:

But *the Court* only granted him a rule upon the firſt, as to the authority of the ſupercargo to alter the deſtination of the veſſel in the abſence of his principal: Lord *Ellenborough* C.J. ſaying that if ſuch authority did reſide in *Stout* as ſupercargo, the jury found that he had exerciſed it. Upon the other point all the Court were ſatisfied that the right and true delivery of the goods according to the bills of lading was ſatisfied for the purpoſe of this action by the delivery of the entire number of cheſts, which had been received by the owners; and that the deteriorated ſtate of their contents, owing to the negligence of the maſter in not giving them ſufficient ventilation, was no anſwer to this action. *Bayley* J. added, that if the like good condition of the cargo when delivered

delivered as when ſhipped were a condition precedent to the right to recover the freight, then if the goods were damaged to the extent only of a farthing, the maſter would not be entitled to recover any freight, which never could have been the intention of the contracting parties.

And now, after the demurrers were diſpoſed of, and the report of the evidence had been read, on the motion for the new trial, Lord *Ellenborough* C. J. aſked, how after the deciſion of the Court this morning on the demurrer to the third plea as to the authority of the freighter himſelf to alter the original deſtination, the iſſue upon the replication to the ſecond plea could be material? But the defendant's counſel, conſidering him entitled to have had that iſſue found for him at the trial, (which would at leaſt affect the coſts) would not wave the rule.

The Attorney-General, *Park*, and *Taddy*, therefore, ſhortly ſhewed cauſe againſt the rule, and inſiſted upon the authority of the ſupercargo to countermand in the abſence of his principal the order to go to *Gibraltar*, and to order the maſter to go to *Liſbon*, to which he was originally deſtined. They obſerved upon the proviſions in the charter-party, whereby the maſter expreſsly covenanted to receive the ſupercargo on board, and to proceed to *Spain* or *Portugal* as he ſhould be ordered by the freighter, *his agents or aſſigns*. And they contended for ſuch an authority upon the general nature of a ſupercargo's appointment, when not obviouſly reſtrained by the contract of his principal, the nature of the voyage or other ſpecial circumſtances; and inſiſted that at all events, the fact of his having given an order to proceed to *Liſbon*, which was found by the jury, decided the iſſue in queſtion.

Garrow,

1810.

DAVIDSON *against* GWYNNE.

Garrow, *Marryat*, and *Lawes*, contrà, contended that the order given to the maſter by the ſupercargo to go to *Liſbon* (taking it to have been ſo found by the jury) was not binding on the defendant, and therefore he did not give ſuch order in the terms of the iſſue. A ſupercargo has no authority to give an order in expreſs contradiction to a recent order given by his principal, without any change of circumſtances, and while the ſhip remains at home, and immediate reference can be had to the principal himſelf. The general nature of a ſupercargo's authority ariſes from neceſſity when he is abſent with the ſhip in foreign parts, out of the reach of immediate communication with his principal, and obliged often to act on the ſpur of the occaſion for the benefit of the adventure which he ſuperintends: The immediate object of his appointment is to control the ſale of the cargo when it arrives at its port of deſtination, but not to alter the deſtination itſelf; and ſtill leſs, while the ſhip remains in a port at home within reach of the perſonal control of the principal.

Lord ELLENBOROUGH C. J. The charter-party imports that the freighter might by himſelf or his agent order the deſtination of the ſhip and cargo to any port in *Spain* or *Portugal*. *Stout* is found to have in fact given a final order in this caſe to proceed to *Liſbon*; and the queſtion is, whether he be ſuch an agent as will bind the defendant for this purpoſe. It was proved that he was appointed by the defendant his ſupercargo. A ſupercargo, unleſs his authority be expreſsly or impliedly reſtrained, muſt from the nature of his employment be inveſted with a complete control over the cargo and every thing which immediately concerns it: that muſt embrace

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its destination. Then unless the supercargo's general power was restrained by any thing in this case from varying the voyage within the limits agreed in the charter-party, he must be taken to have had it; and in fact he exercised it in this case. The only question is whether, as the defendant himself had recently before come down to *Lymington*, and had directed the defendant to go to *Gibraltar*, that restrained the supercargo's general authority? But I do not see how that circumstance could restrain it. It is necessary from the nature of his agency that he should have power to alter the destination of the cargo, particularly in time of war. He may receive recent intelligence that the port of destination last fixed by his principal is blockaded; or other circumstances not less important to the success of the adventure may intervene. Then if he had such a power from the nature of his employment, and there was no special restraint of his authority in this case, and he did in fact change the destination from *Gibraltar* to *Lisbon*, cadet quæstio.

1810.

DAVIDSON *against* GWYNNE.

GROSE J. was of the same opinion.

LE BLANC J. From the nature of the appointment of a supercargo, where he is on board the ship and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure. If indeed the charter-party had been made for a certain voyage, that would be a very different consideration; but I understand this charter-party as giving the freighter authority (unless restrained by circumstances, such as we have before decided upon) from time to time, by himself

1810.

DAVIDSON *against* GWYNNE.

or his agents, to alter the destination of the vessel and cargo within the limits assigned.

BAYLEY J. The power of a supercargo will depend much on the nature of the voyage. Here the destination was not fixed at the time the charter-party was executed, but it was afterwards to be fixed by the freighter or his agents. That shews that some alteration of the destination was looked to in the course of the voyage: The parties seem to have contemplated that circumstances might afterwards occur to make it prudent to alter the destination. Circumstances did occur which first induced the defendant to alter the destination from *Lisbon* to *Gibraltar*, and he altered it accordingly: then his agent who was as supercargo entrusted by him with the control of the cargo, had in his absence the same power as his principal to alter it again, and he ordered the master to go to *Lisbon* as originally intended.

Rule discharged.

Friday, May 25th.

HOPKINS *against* VAUGHAN.

A defendant cannot be held to special bail on an affidavit stating him to be indebted to the plaintiff in so much for goods *bargained and sold*, without also saying *delivered*.

THE defendant having been arrested and committed to custody for want of bail, upon an affidavit to hold to bail, stating him to be indebted to the plaintiff in so much *for goods bargained and sold* by the plaintiff to the defendant: *Taddy* on a former day obtained a rule nisi for discharging him on filing common bail, and stated that there was no precedent of an affidavit to hold to bail for goods bargained and sold merely, without its going on to allege that they were *delivered* to the defendant. *Comyn* op-

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1810.

HOPKINS *against* VAUGHAN.

posed the rule, on the principle that as an action of indebitatus assumpsit would lie for goods bargained and sold, such an affidavit of the debt must necessarily be good. And he cited *Slade*'s case (*a*), and *Dy*. 30. *a*. to shew that debt lies upon such a contract; and *Knight* v. *Hopper* (*b*), and *Sheph. Touch*. 222. (*c*) that the property passes on the sale.

The Court, however, directed the matter to stand over till inquiry had been made whether there were any precedent of a defendant held to bail on such an affidavit; intimating that they were not inclined to extend the practice beyond what had prevailed: and adverting to the abuses which had crept in, without observation, of holding persons to bail in trover; which abuse had been lately reformed by the Court. And Ld. *Ellenborough* C. J. said that there was a material difference in this respect between the case of goods sold and *delivered*, and that of goods only bargained and sold. In the one case the owner having parted with his goods is entitled absolutely to the price; in the other, where the goods are not delivered, he is entitled only to recover the difference in damages between the value of the goods and the price agreed on. And by *Bayley* J. There is no reason why the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands.

After inquiry made, it now appeared, that in fact there had been instances of defendants holden to bail upon such affidavits; but they had passed without opposition, and this was the first instance in which the atten-

(*a*) 4 *Rep*. 93, 4. 5. (*b*) *Skyn*. 647. (*c*) 5th edit. ch. 10.

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1810.

HOPKINS *against* VAUGHAN.

tion of the Court had been called to the subject: therefore the Court, adverting principally to the hardship of holding a party to bail for the value of goods sold by one who at the same time retained the security of the same goods in his own hands, made the

Rule absolute.

Friday, May 25th.

Sir THEOPHILUS METCALF, Bart. and Others *against* BRUIN.

A bond given to *trustees* to secure the faithful services of a clerk, to *the* Globe *Insurance Company*, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer, the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body, and the intervention of the *trustees* removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body.

THIS was an action on a bond for 2000*l*., dated the 18th of *June* 1803, whereby the defendant, as surety for *T. H. Wilkinson*, together with *Wilkinson* and another surety, bound themselves jointly and severally to the plaintiffs and two others, described in such bond as *seven of the trustees of the* Globe *Insurance Company*, or to their certain attornies, executors, administrators, or assigns: with a condition, reciting, that whereas *Wilkinson* was chosen and admitted into the service of the *Globe Insurance Company*; the condition of the obligation was, that if *Wilkinson* should from time to time and at all times thereafter, *during his continuance in the service of the said company*, faithfully perform the said service, and all other services of the said company wherein he should be employed, and should, as soon as required, deliver in writing a true account of all monies, &c. which in the said service should come to his hands on account of the said company, and pay over the balance to the said company, or to such person *as the said company*, or the court of directors thereof, *for the time being*, should appoint;

and

1810.

METCALF *against* BEVIN.

and should indemnify the said company and the directors, and *all other members thereof*, from all losses, actions, costs, &c. and expences which might be sued or prosecuted against them, or which the said company, or any member or members thereof, should or might bear, &c. by reason of any thing done or neglected, &c. by *Wilkinson* in or during his said service; then the obligation to be void. To this there were pleas of non est factum, and of performance, &c.: and the replication assigned breaches, in not paying over different sums received by *Wilkinson* for the company; on which issues were taken: and it was agreed at the trial, that if the plaintiffs were entitled to recover at all, the amount of the damages sustained upon those breaches should be referred to arbitrators.

But the principal question was, whether, as during the time that *Wilkinson* continued in the service of the company as secretary, which was from the date of the bond till *December* 1808, many of the members were changed (*a*) by death and transfer of shares, the plaintiffs were entitled to recover at all upon this bond? The plaintiffs took a verdict pro formâ at the trial, and liberty was given to the defendant to move the Court to set aside that verdict, and enter a nonsuit.

The Attorney-General accordingly obtained a rule nisi for this purpose on the first day of the term; when he opened the question, and stated that the *Globe* Insurance Company was not a corporation, but by an act of the present king the company are enabled to sue and be sued by its treasurer: and he pointed to the difficulties which resulted on this and other occasions from this anomalous description of body politic. For not being a corporation, the law can only look to the com-

(*a*) The fluctuation was proved to be from 50 to 100 in every year.

1810.

METCALF against BRUIN.

pany as individuals, and therefore a contract entered into by them, or by others on their behalf, can only be construed as a contract with so many hundred individuals, and must be governed by the same rules of law as if the individual members had contracted in their own names. Hence much confusion and perplexity and many inconveniencies must, no doubt, arise, which could only be solved by applying to these bodies the characters of unity and perpetuity attributed by law only to corporations; which could not be done And he deduced this consequence from considering the company in legal strictness only as so many individual partners contracting with the defendant, that upon any change of the then existing partners or members with whom the contract was made, the obligation was gone, according to all the cases (*a*).

Lord ELLENBOROUGH C. J. then pointed to a distinction in this case, that here was no question as to the persons to whom the obligation was made: the only question was as to the description of persons to whom the service was conditioned to be performed, (who are described to be *the* Globe *Insurance Company*;) whether the obligors must not be taken by that description to have intended those who compose the company *for the time being*: which latter words occur in the condition, the whole of which seems to point at the same meaning.

Garrow, *Topping*, and *Taddy*, now shewed cause against the rule, and observed that the bond had been taken to trustees for the benefit of the company, on account of their not being a corporation, nor under legislative ap-

(*a*) Vide *Strange* v. *Lee*, 3 *East*, 484. where all the prior cases are collected; and *Dance* v. *Girdler*, 1 *New Rep.* 34.

 pointment

pointment to sue and be sued by their treasurer at the time when the bond was executed: but the interposition of trustees, who now sue, obviates all the legal difficulties which have existed in other cases, and brings the case to a question of mere intention, whether by the description of *the company* to whom the service was to be performed, the members for the time being were not necessarily meant. In some of the cases reliance was had on the circumstance that the obligor might have been induced to enter into the obligation to secure the fidelity of a clerk to the house or firm of the obligees from his knowledge of and reliance on the particular partners at the time, to whom the faithful service was secured, that they would use due diligence to prevent or speedily to detect any malversation of their clerks; but that argument cannot apply to the case of a known shifting society composed of an indefinite or very numerous body of persons, the members of which every person must know were liable to be changed every day. This case, therefore, is stronger than that of *Barclay and Others* v. *Lucas* (a), where the obligation was to the plaintiffs by name; but the condition, reciting that the clerk was to be taken *into their service and employ* as a clerk *in their shop and counting-house*, it was held not to be affected by their taking another partner into their house. Unless it can be said that *company* cannot mean in legal acceptation a fluctuating body, the Court will understand the word as it occurs in the condition of this bond in the same manner that every body else must have understood it at the time.

(a) *M.* 24 *Geo.* 3. *B.R.*, cited in *Barker* v. *Parker*, 1 *Term Rep.* 291.

1810.

METCALF against BRUIN.

The Attorney-General, Park, Wigley, and *Comyn*, contrà, relied upon the same general arguments which were before urged in moving for the rule; and answered further, that as the law only recognized corporate and natural bodies, the word *company* must be taken in its legal sense to mean the then existing natural persons of whom the company was composed at the time it was executed. [Lord *Ellenborough* C. J. Why may it not have been used in its popular sense? May not a bond be taken in the name of a trustee to secure the service of one to the occasional subscribers to a public room?] That would describe in the terms of it a fluctuating body. If this bond do not cease to communicate benefit to part of the body going out, it cannot in justice communicate benefit to others coming into the company after it was executed. Now supposing the body consisted of 20 persons at that time, 10 of whom went out the next year; it cannot be doubted that any person having demands on the company, *e.g.* a carpenter, for work done in their office while those 10 continued members, might sue them, as well as the ten who remained in: and it would be no answer that the credit was given to *the company*, and not to the individuals, and that the 10 had ceased to be members. Nor would it vary the case that the credit had been placed in the creditor's books to *the* Globe *Insurance Company*, or that the parties so meant it, and did not contemplate the legal distinction now in discussion; for when an action was brought to recover the debt, the company not being a corporation, it could only be brought against the individual members at the time of the debt contracted. If *Wilkinson* then received money of the company to pay such a demand at the time, and

 embezzled

embezzled it, thoſe perſons who would continue liable to the original creditor, though they had ceaſed afterwards to be members, would have a right to be indemnified by the obligors. On the other hand, to ſay that the bond ſhall include all perſons who ſhall have been members of the company at any time during the exiſtence of the bond would make it a monſtrous anomaly.

Lord ELLENBOROUGH C. J. We cannot enhance the obligation beyond the terms of it; the only queſtion, therefore, is upon the fair meaning of the terms uſed in it; and we muſt put upon the word *company* the ſenſe in which the parties themſelves uſed it in this inſtrument. We could not, indeed, invert the rules of law to enable perſons to ſue as a body or company who are not a corporation; but here the bond has been given to truſtees, who are under no difficulty of ſuing upon it in their own names; and the only queſtion is as to the deſcription of perſons meant to be deſignated under the term *company*. I will begin, therefore, by tranſlating that word according to the ſubject-matter, namely, the *Globe* Inſurance Company: it meant a fluctuating or ſucceſſive body of perſons who ſhould from time to time be carrying on the buſineſs of inſurance under the name of the *Globe* Inſurance Company. Now ſuppoſe a bond given to a truſtee to ſecure the performance of certain ſervices to the commoners of ſuch a common, would there be any difficulty in applying it to the uſe of the commoners for the time being, whoever they might happen to be, during the period for which the ſervices were to be performed. There could be no doubt of it. Now the perſons conſtituting this company laboured at the time under an imperfection to contract from the fluctuating nature

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1810.

METCALF *against* BRUIN.

of their body, and therefore they conſtituted ſeven perſons to be truſtees for them; and whether thoſe ſeven were members of the body or not is for this purpoſe indifferent. Thoſe ſeven entered into this contract for the benefit of the company; and if it had not been underſtood by the contracting parties that the company therein mentioned meant a fluctuating company, we muſt ſuppoſe that they contemplated that the bond might probably be gone in 24 hours; which never could have been meant: It muſt, therefore, have been intended to ſecure the faithful performance of the ſervice to a ſucceſſion of maſters, who might from time to time conſtitute the company. *Wilkinſon* then was admitted into the ſervice of the *Globe* Inſurance Company; the parties well knowing that a body ſo conſtituted would be continually changing and fluctuating: and they looked to his "*continuance* in the ſervice of the ſaid company;" which could not mean a continuing in the ſervice of the ſame individuals, ſome of whom might be changed before the wax on the bond was cold; but muſt have meant the ſucceſſors of the perſons ſo called the *Globe* Inſurance Company. He is then to account to the ſaid company, that is to the ſame ſucceſſive body; and he is to indemnify "the company, and the directors, and all other members thereof from all loſſes, actions, &c. which may be ſued againſt them, or which the ſaid company, or any member or members thereof ſhould bear," &c. by reaſon of his neglect: all this looks to the change which might take place in the body. There is nothing contrary to any rule of law in ſuch an agreement: a man may well agree to ſerve the ſubſcribers to the rooms at *Bath*. A contract with the body itſelf at large would not have done; but a contract with the truſtees for the benefit of the

the body gets rid of all the difficulty. So if a contract were made with the commoners themselves of a certain common, the successive commoners could not come into court and sue upon the contract, but a trust may be created for such a body which would extend to those who were successively clothed with the right of the original body. However anomalous, therefore, the body may be, if we can get at the intent of the contracting parties in their description of it, there is nothing illegal in such a contract. Nor does our opinion clash with any of the cases which have proceeded upon the terms of the respective bonds. A bond to *A.* cannot be extended to *A.* and *B.*, unless, as in *Barclay* v. *Lucas*, the terms of the bond may be taken to explain such an intention. It may be even thought that there was greater difficulty in that case than in the present; but I only collect from it the principle on which it professes to proceed, which was the apparent intention of the parties at the time of entering into the contract to provide for a service to a changeable body carrying on the same concern. In the present case the intent appears very clearly to look to the service of a fluctuating body.

GROSE J. The obligors undoubtedly meant to secure the faithful services of *Wilkinson* to such persons as should be called the *Globe* Insurance Company for the time being. There is no fraud, nor inconvenience, nor any thing illegal in this: the trustees, therefore, to whom the bond is given, may sue upon it: and to determine otherwise would be to violate the manifest intention of the parties.

 LE BLANC J.

1810.

METCALF *against* BAUIN.

Le Blanc J. The difficulty raised in the argument lies in considering this as if it were a bond given to the company, and was now to be enforced in a suit brought by themselves: but that difficulty was gotten rid of by the substitution of the trustees as the obligees of the bond in the place of the company; and the only question now is as to the intent of the parties in the description of *the company*, to whom the service was to be performed. Now the persons in contemplation to be secured were the owners of shares in this company, which, from their numbers, must necessarily vary almost every day; and in consequence the obligors must have intended to become bound for *Wilkinson*'s service to such persons as should be denominated *the* Globe *Insurance Company*, so so long as they continued owners of shares in that company. I can see no objection to an obligation to a trustee conditioned for the faithful service of one to such persons as should be partners in *Child*'s Banking-house, while they continued partners; and this is in effect the same thing.

Bayley J. This bond must receive such a construction as the parties meant it to have at the time they entered into it: and I must consider that they meant to secure *Wilkinson*'s faithful service to such persons as the company for the time being should consist of: the obligation was to be co-extensive with the service which he continued to perform to the company called the *Globe* Insurance Company. If this were not so, the single change of one out of 900 persons would have put an end to the obligation, and the probability was that in a week or a month after the execution of the bond some one person would drop off. Now it is impossible to consider

that

that for so short a time only the continuance of the service should have been in the contemplation of the one party, or the responsibility attached to it in that of the other. In *Barclay* v. *Lucas* the obligation was understood as intended to secure the service to such persons as should become partners in the same house of trade. This mode of considering the case gets rid of the difficulty started in the argument, that if it were extended beyond the continuance of the then existing members of the body, it should include all who then were and should thereafter become members: but it meant only the company for the time being, which gets rid of the difficulty.

Rule discharged.

CROSBY *against* LENG.

Monday, May 28th.

After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal.

THIS was an action for an assault, very aggravated in its kind, which was tried before *Le Blanc* J. at the last assizes at *York*, when a verdict was given for the Plaintiff for 100*l*. damages, subject to the opinion of the Court upon a point of law which was reserved. And *Park* having moved, by leave, at the beginning of the term for a rule to enter a nonsuit, in order to bring the question before the Court, *Le Blanc* J. now reported shortly that the assault was proved at the trial to have been committed under such circumstances as in his judgment would have amounted to a stabbing within the act of the 43 *G*. 3. *c*. 58.; which makes it a capital felony wilfully, maliciously, and unlawfully, to stab, with intent to murder, maim, disfigure, or disable any person, &c., where, if death had ensued, the case would in law have amounted to murder: and he said that he should have so left the case to a jury on the trial of an

1810.

CROSBY *against* LENG.

an indictment for the felony; but that in this case it appeared by a record produced in court, on the part of the plaintiff, that the defendant had been before tried for the felony and acquitted: and the question was whether, after such acquittal this action lay?

Holroyd and *Richardson* now opposed the rule, and contended that the trespass was not entirely merged in the felony, but only till after the party had been tried for the felony, whether such trial ended in an acquittal or conviction. The justice of the country was then satisfied; and the doctrine of the merger of a trespass in felony was only to stimulate the party injured to bring the offender to trial for the public offence, and to prevent any compromise of that, by denying to him, in the first instance, all redress for the private injury he may have received from the commission of the felonious act, till the judgment of the law had been passed upon it; but by no means to take away his redress absolutely after the ends of public justice were attained. In *Markham* v. *Cobb* (a) *Dodridge* and *Whitlock*, justices, (against *Jones* J.) held that trespass for breaking the plaintiff's house and stealing his money lay after a conviction of the defendant for the burglary and felony. The same point was adjudged by the Court upon a special verdict in *Dawkes* v. *Coveneigh* (b), after a conviction for larceny, on which the convict had his clergy, and was burnt in the hand, and discharged. And Lord *Hale* (c), referring to these authorities, lays it down, that after conviction, the action lies to the party injured, because he has prosecuted the law against the

(a) *W Jones*, 147. *Noy*, 82. *and Latch.* 144.
(b) *M.* anno 1652, *Styl.* 346. and 2 *Rol. Abr.* 557.
(c) 1 *Hale P. C.* 546.

offender,

offender, and there can be no mischief to the commonwealth. The same law then must hold after an acquittal of the felony: and the objection which may be urged, that this may lead to collusive prosecutions for the purpose of an acquittal, cannot hold; for if any collusion appeared, the plaintiff in the action could not recover, because he could not avail himself of a judgment procured by fraud, as was held in the Duchess of *Kingston's* case (*a*). But where no collusion or fraud is shewn, the judgment of acquittal would be conclusive evidence in a collateral proceeding (*b*), that the party was not guilty of the felony: and so *W. Jones*, J. (*c*) who differed from the other judges in *Markham* v. *Cobb*, considered that after an acquittal of the felony, the party grieved might have his action of trespass, because there was no affirmation of record against him. And in *Lutterell* v. *Reynell and Others* (*d*), which was trespass for taking monies numbered, the *Attorney-General* of counsel for the defendants, though he objected as to some of them that the evidence, if true, destroyed the plaintiff's action, as it went to prove the defendants guilty of felony; admitted that it would lie against two of them who had been acquitted upon an indictment of felony for the same matter. "Indeed," said he, "if they had been *acquitted* or *found guilty* of the felony, the action would lie." [*Le Blanc* J. mentioned *Bull. N. P.* 245, which refers to 3 *Mod.* 164, as taking a distinction between the conclusiveness of a conviction and an acquittal in a prosecution for bigamy, when given in evidence in ejectment upon a question touching the validity of the second marriage; that an acquittal ascertains no fact as a conviction does. But at

(*a*) 11 *St. Tr.* 198. *Ambl.* 761, 2.
(*b*) Vide *Bull. N. P.* 244.
(*c*) *W. Jones*, 150.
(*d*) 1 *Mod.* 282.

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1810.

Crosby *against* Leng.

any rate he observed that this was a different case; for here if the felony had been pleaded, the Plaintiff might have replied the record of acquittal; and that would have concluded the question, unless there had been a rejoinder of *per fraudem*.] After the felony has been tried and disposed of, there is a sort of moral estopel in the law of *England*, as Ld. C. J. *Eyre* said in *Gibson* v. *Minet* (*a*), by which no man shall be allowed to allege his own crime in his defence. They alluded to other cases of judgments in rem, which were held to be conclusive: (But *the Court* thought they did not bear on the present question.) They then mentioned a case of *Hayton* v. *Brown*, which was tried before Mr. Baron *Wood* at the last summer assizes at *Lancaster*, where he permitted the plaintiff to recover in an action of trespass for a similar assault to the present, after the defendant had been tried for the felony and acquitted at the antecedent summer assizes.

Park in support of the rule, argued from the defect of precedents in this case in support of the action, that the general opinion of the profession must have been against it, particularly where the occasion must have frequently occurred. The cases have already broken in too much on the common law principle, that the trespass is merged in the felony, by admitting the action to be brought after a *conviction* of the felony: but if this be now extended to cases of acquittal, it will let in all the mischief against which the common law meant to guard, by encouraging faint or collusive prosecutions for the felony, to give a better opportunity to the party injured of obtaining private

(*a*) 1 *H. Blac* 6[illegible].

redress.

redress. The cases are not reconcileable; for in *Higgins* v. *Butcher* (a), all the Court agreed that if one beat the servant of another, so that he die, the master shall not have an action for the battery and loss of service, because the felony drowns the private wrong, and his action is thereby lost. This was prior to *Dawkes* v. *Caveneigh*; but it was agreed to be law in a subsequent case of *Cooper* v. *Witham* (b). He admitted the weight due to the late decision in the case of *Hayton* v. *Brown*; but as that was never brought in revision before the Court in Bank, he considered that decision as still open to review.

Lord ELLENBOROUGH C. J. The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence; and after a verdict either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding quoad the particular matter, that the objection is thereby removed of bringing that sub judice in a civil action, which was the proper subject-matter of a criminal prosecution. Here the defendant having been before tried and acquitted of the felony, the objection founded upon the general policy of the law does not apply. This point has been before decided in the cases of actions brought after a conviction of the defendant for the felony: and the only difference which can be suggested between the case of a prior conviction, and that of an acquittal is, that the acquittal may have

(a) *Tr.* 4 *Jac.* 1. *Yelv.* 90.
(b) *M.* 20 *Car.* 2. 1 *Sid.* 375. But see 1 *Lev.* 247 S. C.

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1810.

Crosby against Leng.

been brought about by the defendant's colluding with the prosecutor: but if the acquittal be shewn either in pleading or by evidence to have been obtained by collusion, it would be put aside, and the objection would still remain. All the mischief therefore that could result from extending the same rule to cases of acquittal, which has established the right to sue after a conviction of the felon, is done away by letting the defendant in to shew that the judgment of acquittal was obtained per fraudem.

Grose J. The true ground of the general rule against the plaintiff's right to sue for damages in a civil action, for any act which amounts to felony, is to prevent the criminal justice of the country from being defeated; which it would be very likely to be if the party were first permitted to obtain a civil satisfaction for the injury: but that does not apply to this case where there has already been a trial and acquittal of the felony.

Le Blanc J. The defendant having been acquitted of the felony, and that without fraud, as it must be taken to be; the case stands clear of the general objection, that if the action were sustained, criminal justice might be defeated. All the cases which shew that the action lies after conviction of the defendant for the felony, apply strongly in support of it after acquittal; for it is a stronger case to permit the party injured to proceed upon his civil remedy to recover damages after a conviction of the offender, when the law has, by means of the forfeiture of his property consequent upon a conviction, taken away from him the means of satisfying the damages. Besides, when the defendant, after an acquittal of the felony, is called upon to make recompence in

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civil damages to the party grieved, it would be stronger for him to be permitted to allege that he was not properly acquitted, than in the other case it would be to allege that he had not been properly convicted. And here the defendant cannot say, against the record of acquittal, that this was a felony. After the question of felony has been determined, it leaves the trespass untouched: the defendant has committed the trespass, which is the subject of the civil action; but the question on the indictment was whether he had not done something more. It often happens that after an acquittal of the felony the defendant is tried for the misdemeanor upon the same evidence: and it would be no objection though the judge might still think that there was evidence of the felony to have gone to the jury.

BAYLEY J. If this action would not lie, there might be cases where a party injured would be without remedy, and yet the wrong-doer would not be liable to punishment: as, for instance, there might be circumstances known only to the plaintiff himself, which, when proved by him upon the prosecution of the defendant for felony, would entitle him to be acquitted; when, without such proof, the evidence might lead to convict him. Suppose, upon the indictment for the felonious stabbing, it lay only within the knowledge of the plaintiff that a previous provocation had been given, which, if death had ensued, would have reduced the offence to manslaughter; there would be a defect of justice if the plaintiff could not afterwards obtain reparation in damages for the civil injury, because for want of the proof of such provocation, known only to himself, the offence appeared to be felony. The record of acquittal is at least conclusive evidence that the defendant was not proved guilty of the felony, and he

cannot

1810.

CROSBY against LANE.

cannot be questioned for the same offence again; but it leaves the civil remedy open. Unless, therefore, in cases where the conduct of the party complaining can be impeached as having colluded in procuring the acquittal, it operates as an answer to any objection that the fact proved would be evidence of felony.

Rule discharged.

Wednesday, May 30th.

The KING against EYRE.

The *lessee* of the *tolls* of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the *occupier* of any local visible property within the parish; nor that he was an *inhabitant resiant* there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge.

THE defendant appealed to the Borough Sessions of *Tewkesbury* against a poor's rate, wherein he was assessed as "lessee of the tolls of the *Key* Bridge" at *Tewkesbury*, at 350*l.* per ann. The Sessions confirmed the rate, upon the general principle, as they stated, that the rent bonâ fide paid by the occupier is the best criterion by which to judge of the value of property; but subject to the opinion of this Court upon the following case:

By the stat. 48 *Geo.* 3. *c.* 62. certain trustees are appointed for rebuilding the *Key* Bridge across the river *Avon*, in the borough of *Tewkesbury* in *Gloucestershire*, and for making convenient roads thereto. The act enacts that out of the first monies arising by the tolls to be collected by virtue of the act, or out of the first money which should be borrowed upon the credit thereof, the trustees shall in the first place pay the expences of passing the act, and repay all sums advanced thereon, with interest, and also all expences in making the plans and estimates of the bridge: "and that after payment thereof, all the money which should come to the hands

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of the trustees or their treasurer for the purposes of the act should from time to time be applied in erecting the turnpikes or toll-houses, and in making the temporary bridge, and in erecting the new bridge, and keeping the same in repair, and opening and making proper approaches thereto, and in defraying all other necessary charges and expences attending the execution of the act, and in paying the interest of the principal money so to be borrowed, and in otherwise carrying this act into execution; and to or for no other use, intent, or purpose whatsoever." "That as soon as the several purposes of the act should be carried into execution, and the principal and interest borrowed and secured thereon should be repaid, all the tolls thereby imposed should absolutely cease, and the new bridge and the approaches leading thereto should thereafter be repaired by such persons as were by law liable to repair the same." The trustees, being empowered by another clause to lease the tolls, under the clauses and stipulations therein expressed, have leased the same to the appellant, at the annual rent of 350*l.* It has been the usual custom of the parish to make their rates upon the pound rent; but it was not proved that the appellant made any profit on the said tolls, nor that such tolls left any residue after payment of the said yearly rent of 350*l.*: on the contrary, *it is believed* that the present lessee has a most unprofitable taking, and that he will not even clear his present rent.

Jervis and *W. E. Taunton*, in support of the order of Sessions, stated, that the objections made below to the rate were, 1st, that the subject-matter of it was occupied for public purposes, and was therefore not rateable at all: but, 2dly, that if it were rateable in the hands of a lessee on account of any personal benefit derived to him-

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1810.

The King *against* Eyre.

self, it did not appear by the case, as stated, whether he derived any such benefit beyond the purposes of the trust.

But *the Court*, after observing upon the loose and imperfect manner in which the case was drawn up; in not stating either that the lessee was the *occupier* of any toll-house or dwelling-house within the parish, which was the proper subject-matter of a rate; or that he was an *inhabitant* of the parish, in the sense which had been lately (*a*) put by the Court on that word in the statute 43 *Eliz. c.* 2.; and in not finding the fact whether the lessee did receive any profit to himself from the tolls beyond the rent which was applicable to public purposes, but merely stating that *it was believed* that he did not; were inclined to have sent the case back to the Sessions to be re-stated in a more perfect manner. But *The Attorney-General* and *Abbott*, in opposition to the rate, having suggested that it would not answer any purpose to send the case back, all the facts having been stated which were capable of proof on the part of those who supported the rate; and that the only question meant to be raised by them was, Whether the tolls of a public bridge were rateable in the hands of a lessee? Lord *Ellenborough* C. J. said that as the Court had so recently decided that tolls per se were not rateable; and that as the appellant was rated merely as lessee of the tolls, and for nothing else, which might have given them a corporeal quality and locality within the parish, such as for a sluice, or the like: and that as it did not appear that he was an *inhabitant* of the parish, or made any profit of the tolls; there was nothing stated in the case to raise any

(*a*) Vide *Rex* v. *Nicholson*, ante, 330. and *Williams* v. *Jones*, ante, 346.

question;

1810.

The King *against* Eyre.

question. And that though it should turn out to be the fact (which was suggested from the bar) that there was a toll-house attached to the bridge where the appellant dwelt; yet as the sending the case back to the Sessions to be re-stated would probably only lead to their inserting as a fact what at present they had only stated as matter of belief, that the lessee derived no profit to himself from the tolls; it was better for all parties to quash this rate; and if at any future time the parish thought they could make out a better case against the lessee, they might rate him again.

Per Curiam, Order of Sessions confirming the Rate quashed.

GORDON *against* SWAN.

Wednesday, May 30th.

Though an agreement for the sale of goods which were afterwards delivered give a certain day of payment for the price, interest does not run upon the sum due from that day.

THE plaintiff declared in the common form of the count for goods sold and delivered, and sought to recover a large sum, the value of copper sold by him to the defendant, under a contract in writing, which was given in evidence at the trial, and stated the copper sold to be 150 tons, at 84*l*. per ton, to be received in 14 days, payable at six months; the credit on which expired on the 23d of *April* 1809. After judgment by default, and a writ of inquiry issued, the balance due to the plaintiff at the time of the trial of the inquisition (after allowing the amount of certain securities then in his hands) was proved to be 3247*l*. 18*s*., and the *interest* on the whole account amounted to 300*l*.; and the jury, in answer to a question put to them, declared their willingness to give the interest as well as principal; but the under-sheriff directed them, that in point of law the plaintiff was not entitled to recover interest, as he had not declared specially upon

1810.

GORDON *against* SWAN.

the contract, but generally for the value of goods sold and delivered; and on that express direction they found the principal sum only, without interest.

Taddy now moved (*a*) to set aside the inquisition, upon the misdirection of the under-sheriff; and contended that interest began to run after the expiration of the six months for which the credit was given; and that the giving of a particular day of payment for goods sold and delivered shewed the intention of the parties to consider it as a liquidated debt at that period; and made it competent at least for the jury to allow interest. And he referred to *Mountford* v. *Willes* (*b*), where the vendor was held entitled to interest under such a contract from the day of payment given. But by

Lord ELLENBOROUGH C. J. I think the contract only meant that the vendee at all events shall not be called upon for payment till the time given; but it is still a contract for the sale of goods. The giving of interest should, I think, be confined to bills of exchange, and such like instruments, and to agreements reserving interest.

Per Curiam, Rule refused.

(*a*) I was not present in court when this motion was made, but a friend at the bar gave me a note of what passed.

(*b*) 2 *Bos* & *Pull* 337.

Wednesday, May 30th.

NAPIER *against* SHNEIDER.

Upon a motion to refer it to the Master to compute principal, interest, and costs upon a bill of exchange drawn in *Scotland* upon and accepted by the defendant in *England*, the Court will not direct the Master to allow re-exchange.

CAMPBELL moved to refer it to the Master to tax principal, interest, and costs upon a bill of exchange. The bill was drawn in *Scotland*, and was accepted by

the

the defendant in *England*, but not paid; and he prayed that the Master should be directed to allow re-exchange. But

1810.

NAPIER *against* SNEIDER.

The Court were clearly of opinion that this could not be allowed against an acceptor here, who by his acceptance only charges himself with a liability to pay according to the law of this country; and if he do not pay, the holder has his remedy over against the drawer. The Court would not, they said, refer it to the Master to try foreign customs and facts, but only to compute what was due upon the bill itself. They, therefore, granted the motion in the common form.

GOUTHWAITE *against* DUCKWORTH, BROWNE, and POWELL.

Friday, June 1st.

A and *B.*, general partners in trade, being indebted to *C.* for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to *Spain*; with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should purchase goods for the adventure to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to *C.*, to go in liquidation of his demand on them; but *C.* was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to *A.* and *B.*: held that this agreement constituted a *partnership* between the three in the adventure *at* and from *the time of the purchase of the goods for the adventure* by *A.* and *B.*; although *C.* did not go with them to make the purchase, nor authorize them to purchase on the *joint* account; but *A* and *B.* alone in fact made the purchase; and although *C.* also purchased in his own name and paid for goods to be sent out at the same time, in which *B.* was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three.

THIS was an action for goods sold and delivered, which was tried before *Le Blanc* J. at the last assizes at *Lancaster*, when it appeared that the goods had been in fact supplied by the plaintiff to *Browne* and Company, which at that time was generally understood to mean *Browne* and *Powell*, and they alone paid for the cartage of the goods from the plantiff's to the ship on board which they were ordered to be sent: but *Browne* and

1810.

GOUTHWAITE *against* DUCKWORTH.

Powell afterwards becoming bankrupts, and *Duckworth* having been examined by the commiſſioners under their commiſſion, the queſtion aroſe upon his depoſition whether he were not a partner with *Browne* and *Powell* in the adventure for which theſe goods were ordered, which were afterwards ſhipped and ſent: and this was the only queſtion at the trial; where, the learned Judge being of opinion that the facts ſtated in ſuch depoſition amounted to a partnerſhip between the defendants, a verdict paſſed for the plaintiff. And a motion having been made, in order to take the opinion of the Court upon the caſe, to ſet aſide the verdict for the plaintiff and enter a verdict for the defendants;

Le Blanc J. now reported the facts, and read the examination of the defendant *Duckworth* taken on the 27th of *April* 1809, on which the queſtion aroſe; and which ſtated in ſubſtance, that *Duckworth* had various tranſactions in buſineſs with *Browne* and *Powell* in 1808, and was a creditor of theirs. That in *September* 1808 he entered into an agreement with *Browne* to be *jointly* concerned in an adventure to *Liſbon* with him and his partner *Powell*; of which adventure *Duckworth* was to have one-half ſhare. That *Browne* and *Powell* were at that time indebted to *Duckworth* in nearly 2000*l.* for advances made on the *joint account* of the three in the purchaſe of tobacco, and which had been ſent out on the *joint* account to *Spain* before that time; and alſo for money lent before that time. *That* Browne *and* Powell *were to purchaſe goods for the adventure to* Liſbon, *which were to be ſhipped on board the* Betſey, *and to pay for the ſame, and the returns of ſuch adventure were to be made to* Duckworth *and to go in liquidation of his demands on* Browne *and* Powell. That in conſequence of this agreement, *Browne* proceeded to purchaſe goods from different perſons, and amongſt others from the plaintiff *Gouthwaite*: but *Duckworth* did not go

with *Browne* to make any of the purchases, nor did he ever authorize *Browne* to make the purchases on the *joint* account of the three. That if any loss were to arise on the sales of the adventure, *Duckworth* was to bear his proportion, and was also to receive his share of the profits, if any, after reimbursing himself out of the returns the amount of his advances previously made to *Browne* and *Powell*. That *Duckworth* purchased and paid for goods also to be sent out at the same time, *in his own name;* and *Browne* was to receive a share of the profit, and to bear a proportion of the loss on the sales of these last-mentioned goods, which were consigned for sales and returns to *Barlow*, who went out as supercargo on the joint account of *Browne*, *Powell*, and *Duckworth*. That *Barlow*'s instructions were signed by *Browne* and *Duckworth*. That *Duckworth* afterwards received from *Barlow* on account of such adventure 1861*l*., though from what particular set of goods this arose *Duckworth* could not tell: which sum *Duckworth* applied in reimbursing himself the advances he had made to *Browne* and *Powell* on account of the said adventure and otherwise. It also appeared, that *Duckworth* had at other subsequent times received remittances and goods from *Browne* and *Powell* which he carried to account in reduction of his advances to them; and there were other distinct transactions between them relative to the purchase of goods; in one of which some coffee had been originally purchased from *Sill* in *July* 1808 by *Duckworth* on the *joint* account of himself, *Browne*, and *Powell*, and he paid for them: but *Browne* not paying his moiety of the purchase-money at the time appointed, *Duckworth*, with *Browne*'s consent, took them all on his own account, and in *August* following sold part of them to *Browne* himself, and the price was settled in account

between

1810.

GOUTHWAITE *against* DUCKWORTH.

between them; and this was done to enable *Browne* with the coffee to pay another tradesman for goods furnished to *Browne* for the adventure. All the goods mentioned in the examination were shipped on board the *Betsey* for *Lisbon*, which was chartered by *Browne* and *Powell*.

The rule was now opposed by *Park* and *Littledale*, and supported by *Scarlet*; and it was not denied by the latter that the facts of the case constituted a partnership in the adventure between the three defendants; but the only question made was at what period the partnership commenced: the plaintiff contending that it existed at the time when the goods were ordered: the defendant, that it originated only after the goods had been shipped into the common stock for the purpose of the adventure; likening it to the case of so much capital agreed to be brought by parties into one common stock or house, where each would be answerable separately for such part of his contribution as was raised upon his own separate credit, notwithstanding the object for which it was raised. The defendant's counsel also denied that the object of the joint adventure being to liquidate the prior advances of *Duckworth* to *Browne* and *Powell* could vary the legal effect of the joint engagement; and urged the fact of goods having been furnished by *Duckworth* for the same adventure, which were obtained on his separate credit. [But *Bayley* J. observed that it did not appear that *Duckworth* had brought any goods into the common stock in the transaction in question.] The case mainly relied on by the defendant's counsel was *Saville* v. *Robertson and another* (a), where several agreed to fit out a ship and cargo on a joint adventure; but it was also agreed that

(a) 4 *Term Rep.* 720.

one

one was not to be bound for any goods ordered or shipped by another: and the plaintiff (besides supplying copper sheathing for the vessel, which was admitted to be on the joint concern,) delivered copper on board by the separate order of *Pearce* one of the contracting parties: but this was held not to bind the other parties to the contract, and that the partnership only commenced upon the delivery of the cargo on board. The plaintiff's counsel on the other hand, applied to this case what was said by Lord C. J. *De Grey* upon the subject of partnership in *Grace* v. *Smith* (*a*), where he states the true criterion to be, to inquire whether one agreed to share the profits of the trade with the other, or whether he only relied on those profits as a fund of payment: and here they said it was clear that *Duckworth* was not only to share in the profits upon the goods ordered by *Browne*, but the identical goods which were to constitute the adventure were to be purchased and sent for the express purpose of liquidating *Duckworth*'s demand. And they also referred to *Waugh* v. *Carver* (*b*), where, though it was taken to be the clear sense of the parties to the agreement as between themselves, that they were not to be partners, and that each house was to carry on its trade without risk of each other, and to stand to their own loss; yet as they had agreed to share each other's profits, they were held liable as partners to third persons: and to *Hesketh* v. *Blanchard* (*c*), which went on the same principle.

Lord ELLENBOROUGH C. J. It comes to the question whether, co-temporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as *Duckworth*

(*a*) 2 *Blac. Rep.* 1000. (*b*) 2 *H. Blac.* 235—246.
(*c*) 4 *East*, 144.

states

1810.

GOUTHWAITE *against* DUCKWORTH.

states in his examination, *for the adventure*: that was the agreement. Then what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of *Saville* v. *Robertson* does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement *for the adventure*, of which it had been before settled that *Duckworth* was to have a moiety. There seems also to have been some contrivance in this case to keep out of general view the interest which *Duckworth* had in the goods: the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them.

GROSE J. I think this is a strong case of partnership within the description given of it by Lord C. J. *De Grey* in the case cited.

LE BLANC J. The case is the stronger against *Duckworth* inasmuch as there had been a previous partnership between him and the other two defendants upon the pur-

chase

1810.

GOUTHWAITE *against* DUCKWORTH.

chase of tobacco on their joint account, for a similar adventure to *Spain*; in respect of which the latter were indebted to *Duckworth* for his advances upon the joint account: and it was in order to liquidate that debt that the agreement in question was entered into for another *joint* adventure to *Lisbon*, in pursuance of which agreement the goods in question were purchased.

BAYLEY J. In *Saville* v. *Robertson*, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint adventure; and until that further act was done, the goods purchased by each remained the separate property of each. But here as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement.

Rule discharged (*a*).

(*a*) The last case on this subject is *Barton* v. *Hanson and Others*, 2 *Taunt*. 49.

ROCHFORT *against* ROBERTSON.

Monday, June 4th.

Where the defendant was residing in *London* before and at the commencement of the action, eight days' notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from *London*, (to *Tortola*), if he did not give the plaintiff previous notice of such removal.

THE defendant resided in *London* at the time when the cause of action, which was for goods sold and delivered accrued, and when the action commenced: but pending the action, and before the plaintiff gave notice of executing a writ of inquiry, the defendant removed permanently to *Tortola*; but his attorney gave the plaintiff

on

1810.

ROCHFORT *against* ROBERTSON.

no notice of the defendant's removal until the plaintiff had given the usual 8 days' notice of executing the writ of inquiry, as for a town cause, which was executed accordingly. Whereupon *Reader* obtained a rule nisi for setting aside the execution of the writ of inquiry, for irregularity; contending that the defendant should have had 14 days' notice, as residing at the time above 40 miles from *London*; and cited *Spencer* v. *Hall* (*a*). [*Bayley* J. Previous notice was there given of the change of residence.]

Richardson on shewing cause observed that the stat. 14. *Geo.* 2. *c.* 17. *s.* 4. was merely for regulating notices of *trial*; but that no statute applied to writs of inquiry (*b*), which depended altogether upon the practice of the Court.

Lord ELLENBOROUGH C. J. If the defendant do not give notice of the change of his residence from town, it must still be taken to be a town cause; and then the notice was regular.

Per Curiam, Rule discharged.

(*a*) 1 *East*, 688.

(*b*) *Lloyd* v. *Hooper*, 7 *East*, 624. was the case of a writ of inquiry; but no distinction was taken between that and a trial at the Sittings.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fiftieth Year of the Reign of GEORGE III.

1810.

The KING *against* The Directors of the BRISTOL Dock Company.

Saturday, June 23d.

Under the Bristol Dock act, 43 G. 3. c. 140. s. 107., which gives compensation where, "by means of the dock-works, or in the progress or execution thereof, damage may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river Avon, from which the brewery had been before supplied by means of pipes laid under low-water-mark; the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament.

SCARLETT moved, upon the acts of the 43 *Geo.* 3. *c.* 140. and 48 *Geo.* 3. *c.* 11. made for improving and completing the harbour of *Bristol*, for a mandamus to the defendants to issue their precept to the sheriffs of *Bristol* for summoning a jury to assess a compensation for an injury sustained by *Rd. Woolfryes* and Co. in consequence of the dock-works. The applicants were brewers occupying a brewhouse and other premises in *Queen-street* in the castle precincts of *Bristol* for a term of seven

1810.

The KING *against* The Directors of the BRISTOL Dock Company.

years, with liberty to purchase the premises for 4000*l.* for the remainder of a term of 40 years granted by the corporation of *Bristol.* Before and at the time of passing the stat. 43 *Geo.* 3. these premises were supplied with fresh water fit for brewing from the river *Avon*, to which the brewery was contiguous, which water was raised and brought into the brewery by pumps and pipes laid into and along the bank, and communicating with the river at low water mark, at which time it was pumped into the brewery: but by means of the works and improvements authorized by the acts of parliament, and particularly by the damming up of the river for the purpose of forming and floating the harbour, the water in the river at the point of communication with the pipes became brackish and noxious, so as to render the water unfit for brewing; by reason of which the applicants had sustained loss in their trade; and after sinking a well for the purpose of getting spring water for the brewery, which in part failed after a time, and was also found unfit for brewing, they were obliged to abandon their premises; and having then applied without effect to the defendants to grant a compensation for their loss estimated at above 3000*l.* they now made this application, for the purpose of trying their right to receive such compensation.

The compensation clause upon which the motion was founded was the 43 *Geo.* 3. *c.* 140. *s.* 107., which, after reciting that the works and improvements authorized by the act would render certain docks and mills useless, " and by means of such works and improvements, or in " the progress and execution thereof, *injury and damage* " *may be done to other hereditaments, houses, lands and tene-* " *ments*, or the same may be rendered less valuable there- " by," enacts that the dock company shall, and they are

thereby

thereby directed " either to purchase, or to make a just " and liberal compensation to the owners and other per- " sons interested in such docks, mills, lands, houses, te- " nements, or hereditaments, so rendered useless, in- " jured, or made less valuable, at the option of such " owner or other persons as aforesaid," &c. And if the claimants do not agree with the directors for the com- pensation to be made, a jury is to be summoned in the manner now prayed for, and to be sworn before the justices of the peace at the quarter sessions, who are to ascertain it.

Upon the opening of this application the great doubt with the Court was, whether the claimants could establish such an interest or easement annexed to their premises in the water of the river *Avon*, which was a public river common alike to all the king's subjects, as would entitle them to compensation under the general words of the clause. And they asked whether, if any person before the act passed had done any thing to deteriorate the water of the river, these parties could have brought an action as for a private injury to their property. *Scarlett* ar- gued that they might; and that there were instances where persons having acquired a right to use the water of rivers for their own purposes, had maintained actions on the case against those who disturbed them in their enjoyment of it, either by drawing off or deteriorating the quality of the water. But by

Lord ELLENBOROUGH C. J. Those were cases where the owners of the property by long enjoyment had ac- quired special rights to the use of the water in its na- tural state as it was accustomed to flow, by way of parti- cular easement to their own properties, and not merely a

 use

1810.

The King against The Directors of the Bristol Dock Company.

use which was common to all the king's subjects. But here the injury, if any, is to all the king's subjects; and that is the subject-matter of indictment and not of action; otherwise every person who had before used the water of the river might equally claim a compensation; for which there is no pretence. And by the same rule if the salubrity of the air in *Bristol* were impaired in consequence of the docks, every inhabitant of the place might as well claim a compensation. For general injuries common to all the subjects the remedy is by indictment; but that I suppose is taken away by the act: (which was admitted:) then the act has taken away the only remedy which the law would have given for this general injury.

Grose J. was of the same opinion.

Le Blanc J. These persons have no more claim to compensation under the act than every inhabitant of *Bristol* would have who had been used to dip a pail into the river for water for the use of his house.

Bayley J. agreed.

Rule refused.

1810.

BATEMAN *against* JOSEPH.

Monday, June 25th.

The want of due notice of the dishonor of a bill is answered by shewing the holder's ignorance of the place of residence of the prior indorser, whom he sues: and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury.

THIS was an action by a subsequent indorsee against the drawee and first indorser of a bill of exchange, which became due on the 27th of *September*, when it was presented for payment to *Parry*, the acceptor, in *London*, and dishonored. Notice of the dishonor reached *Manchester*, where the plaintiff lived, on the 30th of *September*, early enough for him to have given notice to the defendant on that day by the post from *Manchester* to *Liverpool* where the defendant lived; and the plaintiff had the like opportunities of giving notice on the 1st, 2d and 3d of *October*; but no notice was given to the defendant till the 4th, when he received it in a letter from the plaintiff directed to him *at Liverpool* generally. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, this apparent laches of the plaintiff was accounted for by the evidence of his servant, that his master did not know the residence of the defendant till the day when the notice was sent by the post; though it appeared that he knew the residence of *Parry* the acceptor in *London*, and of *Danson* the drawer at *Liverpool*: and his Lordship left it to the jury to say whether the plaintiff had used due diligence in acquiring the knowledge of the defendant's place of residence; for it was admitted that if he had known it at the time when notice of the dishonor reached him at *Manchester*, or had been negligent in his endeavour to acquire that knowledge afterwards, the notice given to the defendant was too late. The jury having found a verdict for the plaintiff;

1810.

BATEMAN *against* JOSEPH.

Garrow now moved for a new trial, and contended that as the law required due diligence in giving notice of the dishonor of a bill to those whom it concerns, it must also require due diligence in making the inquiries necessary to enable him to give the notice: and here there was no evidence of any inquiry concerning the defendant having been made either at any of the banking houses in *Manchester* where the plaintiff was most likely to have received the information, or of the drawer at *Liverpool*.

But *all the Court* agreed that this was a question proper to be left to the jury, and they had decided it. Whether due notice has been given of the dishonor of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder have used due diligence to discover the place of residence of the person to whom the notice is to be given is a question of fact for the jury.

Rule refused.

Monday, June 25th.

ROSCOW *against* HARDY.

The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who, not knowing of the laches, took up the bill: held that his ignorance when he paid the bill of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence.

THE plaintiff, as indorsee, sued the indorser of a bill of exchange for 50*l.* dated *Manchester*, 4th *January* 1810, and stated it to have been drawn by *J.* and *P. Walmsley*, at three months after date, in favor of *R. Kirk* or order, on Messrs. *Shaw* and *Edwards*, *Walbrook*, *London*, and indorsed by *Kirk* to the defendant, and by the defendant to the plaintiff. At the trial at *Guildhall*, before Lord *Ellenborough* C. J. the bill, when

produced,

produced, had eleven other indorsements upon it; and it appeared that it was in the possession of the *Warrington* Bank when it was tendered for acceptance on the 23d of *January*, and refused to be accepted; but it did not appear that the *Warrington* bankers had given any notice of the dishonor at the time to any person; but as soon as the bill was due they again tendered it for payment; which, being refused, they called upon the plaintiff for payment; and he, not knowing any of the circumstances, took the bill up, and then called upon the defendant; who, being apprised of the dishonor on the 23d of *January*, refused payment; alleging his discharge by the laches of the then holders. And upon proof of these facts the plaintiff was nonsuited.

Topping moved to set aside the nonsuit, and contended that the plaintiff ought not to be prejudiced by the laches of the subsequent holders of the bill, of which he was wholly ignorant at the time when he paid it, and without any means of information. The bill apparently came back to him in due course of time, and there was nothing apparent upon the face of it by reference to its date to raise the suspicion of a diligent man that it had been presented for payment and dishonored two months before, nor any thing to impeach his want of due diligence in obtaining knowledge of that fact; and without that knowledge he could not have defended himself against an action on the bill by the *Warrington* bankers. Then no laches being imputable to himself, or apparent upon the face of the bill when paid by him, he ought not to be debarred from his remedy over.

1810.

Roscow *against* Ardy.

Lord Ellenborough C. J. If the indorsers on the bill be once discharged by the laches of the holder at the time in not giving due notice of the dishonor of it, their responsibility cannot be revived by the shifting of the bill into other hands.

Le Blanc J. It is admitted that the fact of the dishonor on the 23d of *January*, and the want of due notice, would have been a good defence to the plaintiff against the *Warrington* bankers, if he had been apprized of it at the time of the demand made upon him; and that such laches was also a discharge to the other indorsers; how then can it change the liability of those other indorsers, who perhaps might have known the fact, and had a legal defence to the action if payment had been then demanded of either of them by the *Warrington* bankers, that those bankers first called upon one of the indorsers, who happened not to know of their laches?

The other Judges assenting,

Rule refused.

Tuesday, June 26th.

Bigland and Another *against* Skelton and Another.

A bond conditioned to pay costs on 29th *November* in *Cumberland*, when taxed by the Master of *K. B.* is forfeited by non-payment; though in fact the costs were only taxed on the 25th of *November*, of which the defendant had no notice on or before the 29th; for the *defendant* might have had them taxed before, and thus have known their amount in time.

DEBT on bond for 200*l.* Plea, craving oyer of the bond and condition, which latter was to abide the award of *T. B.* and *W. B.* in all actions between the plaintiffs and the defendant *Skelton*; and that the costs of the

the caufe and of the arbitration fhould be in the difcretion of the arbitrators; and that the fubmiffion fhould be made a rule of Court: and then the defendants pleaded, that the arbitrators, on the 2d of *September* 1809, awarded (inter alia) that an action then depending between the parties fhould ceafe, and that the defendant fhould, *on the 29th of* November *then next, at a certain houfe at* Wigton *in* Cumberland, *pay the plaintiffs the cofts of the faid action, and of the arbitration, to be taxed by the Mafter of* K. B. *at* Weftminfter: and then averred that the defendant *Skelton* had not further proceeded in the faid action, and that he had not at any time, *on or before the faid 29th of* November *next after making the faid award, any notice that the cofts of the plaintiffs* in the action and arbitration *had been taxed by the Mafter of* K. B., *or to what amount fuch cofts had been taxed*; wherefore he could not pay fuch cofts to the plaintiffs *at the day and place* in the award mentioned, according to the form and effect of the faid award, and of the faid condition. Replication—that after the making of the award, viz. *on the 25th of* November 1809, *the cofts of the plaintiffs* in the action and the cofts of the award *were taxed by the Mafter of* K. B. *at* 44*l.*; and that though the plaintiffs were ready and willing, at the time and place appointed in the award for the payment of the faid cofts, to have accepted the fame fo taxed, to wit, at *Prefton*, &c.; yet the defendant *Skelton* did not then and there pay to the plaintiffs the faid 44*l.*, but made default, &c.; neither hath the defendant at any time hitherto paid the fame, *although the plaintiffs heretofore, viz. on the 30th of* November 1809, *to wit, at* Prefton *aforefaid, &c. gave notice to the defendant* Skelton *that the faid cofts were taxed by the Mafter of* K. B. *at the faid fum of* 44*l. and then and there requefted the defendant to pay them the fame:* and the faid fum is ftill wholly due and unpaid,

1810.

BOGLAND and Another *against* SKILTON and Another.

unpaid, &c. To this the defendants demurred ſpecially, becauſe the replication did not admit the want of notice of the taxation of coſts by the defendant S., as alleged in the plea; nor aver that ſuch notice was given on or before the 29th of *Nov.* 1809, when the taxed coſts were by the award to be paid; and becauſe it attempted to prevent the defendants from inſiſting that no notice of taxation was given to the defendant S. on or before the ſaid 29th of *November*.

Walton, in ſupport of the demurrer, ſtated the queſtion to be whether the defendant were bound to take notice of the taxation of coſts on the 25th, at which he was not preſent, and of which he had no notice, and therefore could not be prepared to pay the amount on the 29th in *Cumberland*. He referred to *Bear* v. *Choldwich* (a), in which the rule was laid down, that where an obligation is conditioned to do a thing which lies more properly within the conuſance of the plaintiff than of the defendant, there notice ſhall be given to the defendant: and amongſt other things is inſtanced the paying of the plaintiff's coſts of ſuit. But he admitted that in *Candler* v. *Fuller* (b), it was held that arbitrators having awarded the defendant to pay the plaintiff's coſts of ſuit, to be taxed by the proper officer of the Court, before a certain day, it was the defendant's buſineſs to have them taxed before that day. And of this opinion were the Court, (without hearing *Littledale* contrà.) And by

Lord ELLENBOROUGH C. J. The defendants had the means of knowing what the taxation of coſts would amount to, in time to have paid them at the time and

(a) Cited in *Hardr.* 42. (b) *Willes*, 62.

place

place specified, by taking out an order for the plaintiffs to attend the taxation: and this point being against the defendants, it is enough, without adverting to any other objection.

Per Curiam, Judgment for the Plaintiffs.

1810.

BIGLAND and Another *against* SKELTON and Another.

GILDART *against* GLADSTONE and GLADSTONE, in Error.

Tuesday, June 26th.

Under the *Liverpool* Dock acts, of 8 *Ann.* and 2 *Geo.* 3 tonnage duties are payable to the Dock Company on all vessels sailing *with cargoes outwards or inwards*, which rate varies according to the several descriptions of voyages in the acts, one of which is to and from *America* generally: so as no ship shall be liable to pay more than once *for the same voyage out and home*: held that a voyage out from *Liverpool* with a cargo to *Halifax* in *North America*, where the ship delivered it, and took in another cargo there for *Demarara* in *South America*, and after delivering that, returned to *Liverpool* with a cargo from *Demarara*, was all *the same voyage out and home* within the meaning of the acts, and chargeable only with one tonnage rate for the use of the docks.

THIS was another action brought in the court of C. P. by the *Gladstones* against *Gildart* to recover back 33*l*. 15*s*. 3*d*. paid by them to *Gildart* by compulsion and under protest, under circumstances similar to those which existed in the case already reported (*a*) between the same parties, and arising upon the same acts of parliament of the 8 *Ann.* *c*. 12. and 2 *Geo*. 3. *c*. 86. for establishing the *Liverpool* docks, and granting certain tonnage-rates on vessels sailing with cargoes outwards or inwards; and which provide that no vessel shall be liable to pay more than once for *the same voyage out and home*. The defendant pleaded the general issue; and at the trial a special verdict was found, stating that the plaintiffs were owners of the ship *Kelton* belonging to and registered at the port of *Liverpool*, which ship in *Sept*. 1807 was about to clear outward from *Liverpool* with a cargo of goods for *Halifax* in *North America*; and thereupon *Gildart*, as collector of the *Liverpool* dock duties, demanded from the plaintiffs as owners of the *Kelton* 33*l*. 15*s*. 3*d*. as the duty

(*a*) 11 *East*, 675. where so much of the acts as is necessary to raise the question is set out.

payable

1810.

GILDART *against* GLADSTONE, in Error.

payable on her so clearing *out*, and refused to permit the ship to clear out till payment of the same: on which the plaintiffs paid that sum to enable their ship to clear out. The ship thereupon cleared out and proceeded with her cargo from *Liverpool* to *Halifax*, where the goods were discharged, and she took in another cargo for *Demerara* in *South America*, which she afterwards delivered there; and then she took in a cargo at *Demerara* for *Liverpool*, and sailed from thence and returned back to and arrived at *Liverpool* in *June* 1808 with the last-mentioned cargo. That upon her arrival there *Gildart*, as collector, demanded from the plaintiffs, as owners of the ship, payment of a further sum of 33*l.* 15*s.* 3*d.* as for the *Liverpool* dock duty, insisted by him to be payable on her entry *inwards*, and refused to admit her to enter until the same was paid: whereupon the plaintiffs paid that sum in order to obtain an entry inwards for their ship into the port of *Liverpool*; having first protested against the validity of the demand. But whether on the whole the plaintiffs below were entitled to recover the last-mentioned sum, the jury submitted to the Court. The court of C. P. gave judgment for the plaintiffs below (*a*), on which this writ of error was brought.

J. Clarke contended that the facts stated in the special verdict disclosed two different voyages, and not the *same* voyage, out and home; and therefore that the plaintiff in error was justified under the stat. 8 *Ann.* in receiving the two sums mentioned in the special verdict as for the duties on *one* voyage *out* from *Liverpool* to *Halifax*, and for *another* voyage *home* from *Demarara* to *Liverpool*; the intermediate voyage from *Halifax* to *De-*

(*a*) Vide 2 *Taunt.* 97.

marara,

marara having broken the continuity of the *same* voyage *out and home*. He relied on the strict words of the act, a departure from which, he said, would open a door to frauds; for different duties being made payable on different classes of voyages, ships intending to go to places in different classes would clear out for the first port in the lower class, and thereby pay only the smaller duty, when they intended ultimately to proceed on a voyage taxed with a higher duty. [But *the Court* said they should decide upon that case when it arose; and intimated that the higher duty or the difference would be afterwards recoverable when the fact was ascertained. Here, however, they said, the vessel went out to *America* and returned from *America*, which was within the same class of voyages described in the act.] He then referred to the judgment of this Court in the former case, where the case is put—"Suppose a ship comes to *Liverpool* in ballast, carries out an outward cargo, and makes several other voyages without touching at *Liverpool*, and then comes into *Liverpool* with a cargo inwards; would there be an exemption from payment for the latter cargo, because the whole duty had been paid for the former? &c. would not the answer have been, that the owner had no right under these acts of parliament for both an outward and an inward cargo, unless they be upon the same voyage:" and he endeavoured to apply that to the present case.

1810.

GILDART *against* GLADSTONE, in Error.

Richardson contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. I should not wish to put a construction on the act which would limit the just profits of this company which the legislature has given to them for the use of their docks; but we must construe the words in their plain and ordinary sense; and nothing

1810.

GILDART *against* GLADSTONE, in Error.

is so familiar upon this subject as to speak of the *same voyage out and home* to the *East Indies* and to the *West Indies*; though such voyages frequently embrace a variety of intermediate parts, as from one presidency to another in the *East Indies*, and from one island to another in the *West*: and the question is, whether the legislature in using these words did not contemplate to use them in their ordinary and familiar sense. What more does the same voyage *out and home* mean than one continued voyage from the departure of the vessel out until her return home? The act does not confine it to the same port of delivery outwards, but embraces intermediate voyages from one port to another before her return home. If indeed the vessel afterwards happened to go upon an intermediate voyage in a different class of duties, that would be another question; but no such difficulty arises in this case; and there being no varying duty, this must be considered as the same voyage out and home, though consisting of different parts, within the meaning of the acts. And this decision is entirely consistent with the construction we put upon them in the former case (*a*).

GROSE J. declared himself of the same opinion.

LE BLANC J. The only question is, What is the meaning of the words, "the same voyage both out and home," for which one duty only is payable? This was a *Liverpool* ship, the owners of which resided there; and she sailed from thence on her outward voyage, which was a voyage from *Liverpool* to *Halifax* and *Demarara*; but the argument now is, that the voyage to *Halifax* only was her

(*a*) *Gildart* v. *Gladstone*, 11 *East*, 675.

outward

1810.

GILDART *against* GLADSTONE, in Error.

outward voyage, and that her proceeding afterwards to *Demarara* was a different voyage out: but we cannot suppose that to have been the meaning of an act imposing a dock duty at home upon the same voyage out and home, which must mean with reference to the port of *Liverpool*, which was the ship's home, and for the use of the docks there. To hold otherwise would be to say that there could only be a voyage out to *one* port abroad. The language of the Court in the former case was applied to a ship not belonging to *Liverpool*, but domiciled at another port, which after leaving *Liverpool* with a cargo might happen to go several intermediate voyages out and home to her place of domicile, and then return again to *Liverpool*: and that the Court held did not privilege her to sail outwards from *Liverpool* again upon a distinct voyage outwards, without payment of a new duty. The inconvenience suggested is that a ship may clear out to the nearest port to which she is destined, for which the smallest duty is payable, and afterwards pursue her voyage to a more distant port, for which a higher rate of duty is payable, and so avoid the higher duty: but it will be sufficient to deal with that case when it arises: that may require a different consideration: the duty may be collected either on the voyage outwards or homewards.

BAYLEY J. A voyage may be considered as the same voyage out and home, though the ship bring home a cargo from a different port from that where she delivered her outward-bound cargo; and there may be different stages in the same voyage out and home. The crew are always engaged for the whole voyage out and home; and the ship's trading to different ports in her progress out and home would not vary the contract with them. Now

here,

1810.

GILDART *against* GLADSTONE, in Error.

here, *America* was the place, within the description of the act, to which her outward-bound cargo was sent, and *America* was also the place from whence she brought her homeward cargo; and it made no difference to the port of *Liverpool* whether or not she made any intermediate voyages to different parts of *America*. The expression alluded to as falling from the Court in giving judgment in the former case related to the supposed case of a ship not belonging to *Liverpool*, but coming there in ballast, and carrying out a cargo, and then going intermediate voyages out and home to and from the place to which she belonged, and then returning again to *Liverpool*.

Judgment confirmed.

Wednesday, June 27th.

FENN, on the several Demises of THO. MATTHEWS, EDW. LEWIS and CHAS. LEWIS, *against* SMART.

A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion.

THIS ejectment was brought to recover a dwelling-house, &c. in the parish of *Caerwent*, in *Monmouthshire*; and the declaration contained three counts on the demise of *Thomas Matthews*, laid 1st, on the 9th of *Dec.* 1790; 2dly, on the 2d of *March* 1808; and 3dly, on the 2d of *Dec.* 1808; and counts on the several demises of *Edward* and *Charles Lewis*, both laid on the 2d of *Dec.* 1808. At the trial before *Bayley* J. at *Monmouth*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

In 1779 *Thomas Matthews*, one of the lessors of the plaintiff, (being lord of the manor of *Caerwent* in the parish of *Caerwent*,) granted a lease to Mr. *Attwood*, an attorney, *for 99 years* determinable on three lives, at a reserved rent of 1*s.* per annum, of part of the waste

lands

1810.

FENN, Lessee of MATTHEWS and LEWIS, *v.* SMART.

lands of the manor of *Caerwent*, on which part the premises in dispute, being a large dwelling-house and garden, pleasure ground, &c. were erected and laid out by Mr. *Attwood*. The three lives in the lease were Mr. *Attwood*, his wife, and child, of whom Mrs. *Attwood* is the only survivor. In *Hilary* term 1792 a fine sur conusance de droit come ceo, &c. with proclamations, was levied in C. B., in which *T. B. Bridgen* Esq. was plaintiff, and the said *Charles Attwood* and *Mary* his wife were defendants; which fine comprized the premises in question which had been so leased by *Thomas Matthews*, and was levied to Mr. *Bridgen*, who purchased the premises at that time from Mr. *Attwood*. None of the lessors of the plaintiff had any knowledge of this fine until some time after *Thomas Matthews* had conveyed the premises in question to *Edward* and *Charles Lewis*, by lease and release of the 4th and 5th of *July* 1808. Mr. *Bridgen*, the purchaser under *Attwood*, paid the rent reserved up to 1799. In 1803 the Defendant purchased the premises from Mr. *Bridgen*, and has ever since claimed a freehold therein. Previous to this ejectment being brought, an actual entry was made (*a*) upon the premises in the name of each of the lessors of the plaintiff to avoid the fine. The question was, whether the plaintiff were entitled to recover? If not, a verdict was to be entered for the defendant.

Puller, for the plaintiff, first stated the defendant's objection to be, that the lessors *E.* and *C. Lewis*, who were the purchasers under *Matthews*, the other lessor, could not avail themselves of the forfeiture of the tenant for years, incurred by levying the fine at the time when

(*a*) The entry was in fact made in *November* 1808.

1810.

FENN, Lessee of MATTHEWS and LEWIS, against SMART.

Mathews was seised of the reversion; and that *Mathews*, the only person who could have entered for the forfeiture before his conveyance to the *Lewises*, could not enter for it after he had parted with the reversion: for that a forfeiture of tenant for years only gives a right of entry to the reversioner, which right of entry cannot be conveyed, and therefore the grantee of the reversion cannot take advantage of it. To this he answered, that in the case of a forfeiture by tenant for *years* in levying a fine, no entry was necessary to avoid the *term*, as it would have been to avoid the estate of freehold of a tenant for life. Mr. Justice *Blackstone* (*a*) lays it down generally, that the forfeiture accrues *upon the discovery* of it; and in *Pennant*'s case (*b*), the period of such discovery was held to be material and issuable: but a distinction is there taken in the fifth resolution, between a lease for life and a lease for years: if the latter be made on condition that if the lessee do or omit some collateral act, the lease shall be void; there, if the lessor grant over the reversion, and afterwards the condition be broken, the grantee, though a stranger, shall take the benefit thereof; for the lease is *void*, and *not voidable by re-entry*: but if the lease be made for life, with such condition, there the grantee shall never take benefit of it; for the estate for life doth not determine before entry, and entry or re-entry in no case by the common law can be given to a stranger. The same distinction is taken in *Mathew Manning*'s case (*c*), and in *Co. Lit.* 214. *b.* 215. *a.* And Ld. *Coke* in the latter place also states another diversity between conditions in *deed*

(*a*) 2 Vol. *Com.* 275.

(*b*) 3 *Rep.* 65. and *L'Estrange* v. *Temple*, 1 *Sid.* 90. and *Buckler* v. *Hardy*, *Cro. Eliz.* 450. 585. were also referred to.

(*c*) 8 *Rep.* 95. *b.*

and

and in *law*; and puts the case of a lease for *life*, to which there is a condition in law annexed, that if the lessee make a greater estate, &c. the lessor may enter; and he says that of this and the like conditions in law which give an entry to the lessor, not only the lessor and his heirs shall take benefit of it, but also his assignee, and the lord by escheat, "every one for the condition in law "broken in their own time." This latter, it is to be observed, is said of a freehold interest determinable only by entry. Again, Lord *Coke* says, there is a diversity between the common law, of which *Littleton* wrote, and the law at this day by force of the stat. 32 *H.* 8. *c.* 34.; that by the common law no grantee of a reversion could take advantage of a re-entry by force of any condition; but now by that statute all grantees or assignees of reversions may have the like advantages against the lessees by entry for non-payment of rent, or for doing of waste, or other forfeiture, and shall also have the like benefit and remedies by action only for not performing of other conditions and covenants, &c. expressed in their leases, as the lessors or grantors or their heirs might have had. But this statute does not affect conditions in law; and what was said in *Eyre*'s case (*a*), against the successor of an ecclesiastical person taking advantage of a condition in law broken by a lessee for years in the time of his predecessor, must be taken with reference to this statute. Here then it was a condition in law annexed to *Attwood*'s estate for 99 years, that he should not levy a fine; and having levied it, his estate, which was only a chattel interest, was absolutely avoided and ceased altogether; and it not being necessary to avoid it by entry, as in the case

(*a*) *Moor*, 52.

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1810.

FENN, Lessee of MATTHEWS and LEWIS, against SMART.

of a freehold, the grantee of the reversion may take advantage of it at any time, as soon as the forfeiture is discovered. And if this distinction hold with regard to a condition in deed annexed to the grant of a term of years, à fortiori it should hold in the case of a condition annexed to such an estate by law, to which greater effect ought to be given. [*Bayley* J. Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid the estate: but if the estate be granted upon condition that if the grantee do such an act, the estate shall thereupon immediately cease and determine, there no entry is necessary.]

Abbott, contrà, said that the fine of a tenant for years continuing in possession and paying rent, being described in the books (*a*) as a mere nullity, like the fine of a copyholder, no injustice could be worked by it, and therefore no injustice will be done by suffering the tenant to continue in possession to the end of the lease; which was all that he now claimed. [But this proposal not being acceded to;] he contended that no advantage could now be taken of the forfeiture, which happened in the time of *Matthews* the former reversioner, who has since granted the reversion to the *Lewises*. *Littleton* (*b*) says, that no entry, nor re-entry, which is the same thing, may be reserved or given to any person, but only to the donor or lessor or to their heirs; and such re-entry cannot be given to any other person. And then he puts the case if one let to another for life by indenture rendering rent; and for default of payment a re-entry, &c.: if the rent be

(*a*) *Fermor's* case, 3 *Rep*. 77. *b*. 79. *a*. *b*. (*b*) *f*. 347. *Co. Lit*. 214. *b*.

behind,

1810.

FENN, Lessee of MATTHEWS and LEWIS, against SMART.

behind, the grantee of the reversion may distrain for it, but may not enter and oust the tenant, as the lessor or his heirs might have done if the reversion had continued in them. "And in this case *the entry is taken away for ever*; for the grantee of the reversion cannot enter, causâ quâ suprà: and the lessor or his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, &c.; and this may not be, because he hath aliened from him the reversion." The distinction taken as to estates avoided upon condition broken, without entry, refers to conditions in *deed*, where by the express terms of the deed the estate is declared to cease and be void on breach of the condition. But this is a breach of a condition in law, which the party may or may not take advantage of; and if he do not, the estate continues in law, and the grantee cannot afterwards enter for the forfeiture. None of the cases of entry for forfeiture distinguish between terms for years or for life. Every one, Lord *Coke* says (*a*), shall take advantage of the condition *in law* broken *in his own time*. 3 *Com. Dig. Forfeiture*, A. 6 & 7. states that "Entry for a forfeiture ought to be by him who is next in reversion or remainder after the forfeited estate—as if tenant for life, *or years*, commit a forfeiture, he who has the immediate reversion or remainder ought to enter," &c. and cites 1 *Rol.* 857. l. 45. 50. 858. l. 5. "But he in the next remainder or reversion shall not enter for the forfeiture if his estate do not continue. In *Johns* v. *Whitley* (*b*), where the question arose upon the breach of a condition in a lease for years, the Court held that the lessor was bound to enter for such condition broken during the continuance of the lease; that

(*a*) Co. Lit. 215. a. (*b*) 3 Wils. 127—140.

1810.

Fenn, Lessee of Matthews and Lewis, *against* Smart.

that is, in effect during the continuance of his estate in the reversion. And in Lady *Montague*'s case (*a*) it was expresly held in the case of a copyholder, that if a forfeiture were incurred by leasing for ten years, and the lord of the manor in whose time the forfeiture was committed died before his entry or seizure, the reversioner could not take advantage of the forfeiture committed before her time. And the same point was ruled in *Roe d. Tarrant* v. *Hellier* (*b*), with the exception of cases where the act of forfeiture destroys the estate of the lord: but here the fine by tenant for years continuing in possession and paying rent could have no such operation. In *Goodright* v. *Forrester* (*c*) this Court held that a right of entry for a forfeiture was not deviseable: then if not deviseable, it is not assignable. [Lord *Ellenborough* C.J. To hold the lease to be absolutely avoided by the levying of the fine, without the entry of the lessor to take advantage of the forfeiture, might in some instances be prejudicial to the lessor himself; as if the lease turned out not to be beneficial to the lessee, who might wish to get rid of it.] He concluded by observing, that where it is made a question in the books, who *may enter*, that must now be taken to mean who has *the right to enter*, and asserts it by action; for actual entry is now only held necessary to avoid a fine with proclamations.

Puller, in reply, insisted that the breach of this condition in law avoided the estate without an actual entry: and that where Lord *Coke* says that every one should take advantage of the condition broken in his own time, that must mean with reference to what he had said before of the breach of such a condition annexed to an estate for

(*a*) *Cro. Jac.* 301. (*b*) 3 *Term Rep.* 162. (*c*) 8 *East*, 552.

life,

life, where an entry is neceſſary. The ſame anſwer will apply to the caſe of the copyholder, who holds at leaſt for life. [Lord *Ellenborough* C. J. His eſtate is held only at the will of the lord.] In effect it is for life, unleſs he incur a forfeiture. Then it cannot be prejudicial to the lord to hold the eſtate to be avoided without entry, as it is always in his power to avail himſelf of the forfeiture or not at his option: and if he did not, it could not be permitted to the tenant to ſet up his own wrongful act againſt the lord.

Lord ELLENBOROUGH C. J., after conſulting with the reſt of the Court, ſaid, that at preſent it appeared to them as if an entry by the lord were neceſſary to avoid the leaſe; but that they would look into the caſes and mention the matter again if in the mean time the leſſors of the plaintiff would not accept the terms offered. And on the next day, his Lordſhip ſaid that they could not find any caſe which eſtabliſhed a difference between tenant for life and tenant for years, as to the neceſſity of an entry to avoid their eſtates, in caſe of a forfeiture incurred by the levying of a fine, but an entry was neceſſary againſt both; and none having been made to avoid the leaſe in the preſent caſe in the time of the then reverſioner, the plaintiff was not entitled to recover. The miſchief, he added, would be enormous, that a tenant ſhould be able to get rid of a burthenſome leaſe at any time by his own wrongful act in levying a fine of the premiſes.

Poſtea to the Defendant (*a*).

(*a*) Vide *Co. Cop.* ſ 60. "Regularly it is true that none can take benefit of a forfeiture but he that is lord of the manor at the time of the forfeiture: and, therefore, if a copyholder maketh a feoffment, and then the lord alieneth, neither the grantor nor the grantee can take benefit of this forfeiture; for neither a right of entry nor a right of action can ever be transferred from one to another. And, therefore, if a freeholder alienate in mortmain, and then the lord granteth away his ſeignory, neither the one nor the other can ever take benefit of this forfeiture."

1810.

Wednesday, June 27th.

WEALL *against* WM. KING and HENRY KING.

Upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a *joint* sale to him by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only as of his separate property, the action, though laid in tort, being founded on the *joint* contract alleged.

THE plaintiff declared that on the 10th of *October* 1805 the defendants at *Weyhill* fair exposed to sale 200 *South Down* lambs as and for stock, *i. e.* sound lambs, and thereupon the plaintiff *bargained with the defendants* for the said lambs, as and for stock, *i. e.* sound lambs, at and for a certain price to be therefore paid by the plaintiff to the defendants for the same; and the defendants by then and there falsely and fradulently warranting the said lambs to be stock, *i. e.* sound lambs, then and there falsely, fraudulently, and deceitfully sold the said 200 *South Down* lambs to the plaintiff, as and for stock, *i. e.* sound lambs, for a large price, to wit, 400*l.*, which was afterwards paid by the plaintiff to the defendants for the same: whereas in fact the said lambs at the time of the sale and warranty of them, as aforesaid, were not stock, *i. e.* sound lambs, but were unsound and afflicted with the rot; by means whereof 37 of them died, and the rest became useless to the plaintiff; and the plaintiff lost the price and expected profit of them, &c. There were other counts laying the contract in different ways, but all of them charging it as a *joint* contract made by the defendants with the plaintiff. The defendants pleaded not guilty: and at the trial before *Heath* J. at *Croydon*, the plaintiff proved a warranty to the effect above stated made by the defendant *Henry King*; but there was no evidence to affect the other defendant *William King*: on which it was objected by the defendant's counsel, that the evidence did not maintain the declaration. To which it was answered that the action arose on the tort and not on the contract.

But

1810.

WEALL *against* KING and Another.

But the learned Judge allowed the objection, and nonsuited the plaintiff; stating that in his consideration of the case, if that reasoning were to prevail, every breach of promise might be converted into a tort. And further, that if this declaration could be considered as laid in tort founded on a contract, he should have submitted the case of *Govett* v. *Radnidge and Others* (a), on which the plaintiff's counsel principally relied, for the reconsideration of the Court of *K. B.*, how far the same could be reconciled with the cases of *Bristow v. Wright* (b), and *Boson* v. *Sanford* (c); more especially as the court of Common Pleas had lately in the two cases of *Powell* v. *Layton* (d), and *Max* v. *Roberts* (e), decided, after mature consideration, against the authority of *Govett* v. *Radnidge*, under similar circumstances. A rule *nisi* was afterwards obtained by *Garrow* in last *Michaelmas* term for setting aside the nonsuit, which in *Easter* term was opposed by *Marryat* and *Lawes*, and supported by *Garrow* and *Espinasse*. I was not present in court at the time when the case was argued; but the subject seems to have been exhausted in the reports of the cases before referred to. And after time taken by the Court to consider of the case, and of the conflicting authorities,

Lord ELLENBOROUGH C. J. now delivered judgment.—

This was an action against the two defendants for deceit, stated to have been committed in a *joint* sale, alleged in the declaration to have been made by them, of some sheep, their joint property, and to have been warranted

(a) 3 *East*, 62. (b) *Dougl.* 665.
(c) *Skin* 278. *Salk.* 440. 3 *Lev.* 258. *Carth.* 58. 2 *Show.* 478.
(d) 2 *New Rep.* 365. (e) 2 *New Rep.* 454 and vide *ante*, 39. S.C.

by

1810.

Weall *against* King and Another.

by them to be ſtock or ſound ſheep, and which proved to be unſound: and the queſtion is whether the nonſuit which proceeded on the ground of there being no evidence in this caſe to affect *William King*, one of the defendants, be maintainable? The argument on the part of the defendant has been, that this is an action founded on the *tort*; that torts are in their nature *ſeveral*; and that in actions of tort one defendant may be acquitted, and others found guilty. This is unqueſtionably true, but ſtill is not ſufficient to decide the preſent queſtion. The declaration alleges the deceit to have been effected *by means* of a *warranty* made by *both the defendants* in the courſe of a *joint* ſale by them both of ſheep, their *joint property*. The joint contract thus deſcribed is the foundation of the joint warranty laid in the declaration, and eſſential to its legal exiſtence and validity: and it is a rule of law that the proof of the contract muſt correſpond with the deſcription of it in all material reſpects: and it cannot be queſtioned that the allegation of a joint contract of ſale was not only material, but eſſentially neceſſary to a joint warranty alleged upon record to have been made by the ſuppoſed ſellers, by whatever circumſtances, and in whatever action, be the ſame debt, aſſumpſit, or tort, the allegation of a contract becomes neceſſary to be made; and ſuch allegation, or any part of it, cannot (as here it certainly cannot) be rejected as mere ſurpluſage: ſuch allegation requires proof ſtrictly correſponding therewith; it is in its nature entire, and indiviſible, and muſt be proved as laid in all material reſpects. We prefer deciding this caſe upon a principle which is certain and univerſal, rather than by a reference to any caſes either of doubtful authority, or in which the particular facts may ſeem to afford a ſpecial rule of conſtruction.

In

1810.

WEALE *against* KING and Another.

In this case a joint contract was necessary to be laid in order to maintain the ground of action as stated upon the record; and being so laid, and not being proved, the plaintiff was properly nonsuited.

Rule discharged.

RIGHT, on the Demises of HARRIETT PHILLIPPS, and Others, *against* SMITH.

Wednesday, June 27th.

Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain* 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last mentioned premises, to raise the 3000*l.* and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust, by sale, lease, or mortgage of the same, to raise 5000*l.*, and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c as they should think proper to raise money to pay his debts, legacies, and funeral expences; and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21, with a

"Proviso—" that it should be lawful for the trustees, and the survivor, at any time "or times *till all* the said lands, &c. devised to them *should actually become vested in any "other person or persons by virtue of the will, or until the same or any part thereof should be "absolutely sold as aforesaid, to lease the same or any part thereof*," for any term of years not exceeding 14, at the best rent:—

Held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described until his son *attained* 21, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees, which was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c.

THIS was an action of ejectment brought to recover possession of a messuage and tenement in *St. Stephens* by *Launceston*, in the county of *Cornwall*. The declaration contained three demises, 1. by *Harriett Phillipps*, widow, Sir *John Kennaway* Bart., *R. Kennaway*, and *R. Winslow*; 2. by *T. J. Phillipps*, and 3. by *Harriett Phillipps* alone. At the trial at *Bodmin* a verdict was found for the plaintiff on the third de-

mise,

1810.

RIGHT, Lessee of PHILLIPPS, against SMITH.

mise, subject to the opinion of the Court on the following case.

Thomas Phillipps being seised in fee of the premises, devised the same as follows: "I devise unto Sir *John* "*Kennaway* Bart., *R. Kennaway*, and *R. Winslow* clerk, "their heirs, executors, administrators and assigns, all "my freehold and leasehold messuages, lands, &c. in "the parish of *St. Stephen*, in the county of *Cornwall*, "(including the premises in question) *upon trust to per-* "*mit and suffer my wife* (the lessor of the plaintiff in the "third demise) *to receive and take the rents and profits* "*thereof until* my son *Thomas Phillips* shall attain the age "of 21 years; and from and after his attaining that age, "then *upon trust and to and for the use* of my said son "*Thomas*, his heirs, executors, &c. during all my estate "and interest therein respectively." The testator then devised to his said trustees and their heirs and assigns as follows, viz. "All my messuages, lands and heredita- "ments then lately purchased by me in the parish of "*Saint Thomas* near *Launceston*; upon trust nevertheless "*to receive the rents and profits thereof until* my said eldest "son *Thomas* shall attain the age of 21 years, and *pay* "*and apply the same* in the mean time in discharge of the "interest to become due on my bond for 3000*l*. And "when my said son shall attain the age of 21 years, *then* "*upon trust* that they, my said trustees, shall *by sale, lease* "*or mortgage* of all or any part of the said last-mentioned "lands, as they my said trustees shall think proper, raise "and levy the sum of 3000*l*., and apply the same in "discharge of the principal monies due on the said bond; "and after raising and payment of the said 3000*l*., and "subject and chargeable thereto, I give and devise the "said last-mentioned messuages, lands, &c. unto and to

"the

1810.

RIGHT, Lessee of PHILLIPPS, against SMITH.

" the use of my said eldest son, on his attaining such age " as aforesaid, and his heirs for ever." The testator then devised to the same trustees " *all my messuages, lands, te-* " *nements and hereditaments of what nature or kind soever,* " *situate in* Tiverton *in the county of* Devon, *or elsewhere in* " *the counties of* Devon *or* Cornwall, *(except as aforesaid)*, " and also all the messuages, lands, &c. whether freehold, " copyhold, or leasehold, which I am lately become en- " titled unto, under the will of my late father, and the " residue of all my real and personal estate and effects " whatsoever, subject to such charges and incumbrances " as are now affecting the same, *to hold the same unto and* " *to the use of them the said trustees, their heirs, executors,* " *administrators and assigns, upon trust nevertheless that* " *they,* my said trustees, *shall at any time after my decease,* " *either by sale, lease, or mortgage, of all and every or any* " *of my said freehold, copyhold, or leasehold messuages,* lands, " &c. or any part thereof respectively by me *lastly* here- " inbefore given and devised to them my said trustees, " as aforesaid, as they shall think proper, raise the said " sum of 3000*l.*, and pay the same to my daughter *Eli-* " *zabeth Patience,* in discharge of a legacy given to her " by the will of Sir *Jonathan Phillipps*; and after pay- " ment thereof shall *absolutely sell and dispose of all or any* " *part or parts of the residue of my said messuages, lands, te-* " *nements and hereditaments, at such time and in such manner* " *also as they my said trustees shall think proper;* and *shall* " *pay the clear residue of the monies* to arise by such sale " in discharge of my debts, funeral expences, and lega- " cies: and upon trust to pay the interest, dividends and " produce of my said real and personal estate, after pay- " ment of such incumbrances, and my debts, funeral ex- " pences, and legacies, as aforesaid, unto my said wife for " the better support of herself and her children until my

" two

1810.

RIGHT, Lessee of PHILLIPPS, against SMITH.

" two children by her shall respectively attain the age of 21 " years, if my said wife shall so long live and continue my " widow: but if not, then upon trust that they my said " trustees shall pay the income and produce of the residue of my said real and personal estate unto and for " the benefit of my said two children, by my present " wife, as my said trustees shall think proper, till such " children shall attain such respective ages as aforesaid; " *and then, upon trust to pay, assign, convey and transfer all* " *the residue of my real and personal estate*, subject as aforesaid, unto my said two children, their heirs, executors, " &c. equally between them as tenants in common: or " if either such children shall die under that age, then to " the survivor of them, his or her heirs, executors, &c. " on his or her attaining such age as aforesaid. And if " both my said children by my present wife shall die " under 21, then upon trust to pay the clear income " and produce of the residue of my said real and personal " estate to my said wife for her life; and after her decease, to pay and transfer the residue of my said real " and personal estate unto my son *Thomas* and my daughter *Elizabeth Patience*, equally between them, share " and share alike, when and as they shall respectively " attain the age of 21 years, and the income thereof in " the mean time: and if either of such last-mentioned " children shall die under that age, then to the survivor " of them, his or her heirs, executors, &c. on his or her " attaining such age as aforesaid." Then followed this provision. " Provided also, and I do hereby direct, that " it shall and may be lawful for my said trustees, and " the survivors, &c. at any time or times, *till all the said* " *messuages, lands, tenements and premises hereby devised to* " *them upon trust as aforesaid shall actually become vested in* " *any other person or persons by virtue of this my will*, or

Leasing power.

 " *until*

1810.

RIGHT, Lessee of PHILLIPPS, against SMITH.

" *until the same or any part thereof shall be absolutely sold* " *and disposed of as aforesaid,* to *demise and lease* the same " premises, or any part thereof, to any persons, for any " term or number of years not exceeding 14 years in " possession, and not in reversion, at the best and most " reasonable rack rent, &c., so as such lease or leases be " made dispunishable of waste: and that the lessee or " lessees do execute counter-parts of such leases respec- " tively." The testator afterwards died seised of the premises mentioned in the third demise, leaving all the lessors of the plaintiff him surviving. If the plaintiff were entitled to recover on such third demise, the verdict was to stand: if not, then a nonsuit was to be entered.

This case was argued in the last term by *A. Moore* for the plaintiff, and by *Courtenay* for the defendant. The argument turned upon the particular words of the will noticed in the judgment of the Court, which was now delivered by

Lord ELLENBOROUGH C. J. — The only question in this case was, whether *Harriet Phillipps* widow, upon whose demise the plaintiff had recovered a verdict, took the legal estate in the premises in question under the will of *Thomas Phillipps?* By that will *Thomas Phillipps* devised to Sir *John Kennaway* Bart. and others, their heirs, executors, administrators, and assigns, all his freehold and leasehold messuages, &c. in *St. Stephen,* upon trust to permit and suffer his wife, the said *Harriet Phillipps,* to receive and take the rents and profits until his son, *Thomas Phillipps,* should attain 21; and upon his said son's attaining that age, then upon trust to and for the use of his said son, his heirs, executors, administrators, and assigns. This devise includes the premises in question,

1810.

RIGHT, Lessee of PHILLIPPS, against SMYTH.

question, which are freehold. The testator also devised certain other premises to Sir *John Kennaway* and the others before named with him, upon trust to receive the rents and profits till his said son *Thomas* should attain 21, and to pay and apply them in the mean time in discharge of the interest on a bond for 3000*l.*; and on the son's attaining 21, upon trust, by sale, lease, or mortgage, of all or any part of those premises to raise the 3000*l.*, and subject thereto, to the use of his said son *Thomas*, on his attaining 21, and his heirs. The testator also gave certain other freehold, copyhold, and leasehold premises, and the residue of his real and personal estate, to the same persons; to hold the same unto and *to the use of them*, their heirs, executors, administrators, and assigns, upon trust that they should, either by sale, lease, or mortgage of all or any part of the real estate, raise the sum of 3000*l.*, and pay it to his daughter *Elizabeth Patience*, in discharge of a legacy given her by Sir *John Phillipps*; and after payment thereof, to sell and absolutely dispose of so much of the real estate as they should think proper, to raise money to pay his debts, funeral expences, and legacies, and upon trust to pay the interest, dividends, and produce of his said real and personal estate to his wife, for the better maintenance of herself and her children, till the testator's two children by her should attain 21, if she should so long continue his widow; but if she should not, then upon trust to pay the income and produce of the residue of his real and personal estate for the benefit of the said children till 21, and then to convey and transfer to them such residue; with further trusts, if either or both of them should die under 21. The will then contains a proviso, "that "it shall and may be lawful to and for my said trustees, "and the survivors and survivor of them, at any time or

 "times,

1810.

RIGHT, Lessee of PHILLIPPS, against SMITH.

" times, *till all* the said messuages, lands, tenements, and " premises hereby devised to them, *upon trust as afore-" said, shall actually become vested in any other person or " persons by virtue of this my will*, or *until the same or any " part thereof shall be absolutely sold and disposed of as afore-" said*, to *demise and lease* the same premises or any part " thereof to any person or persons, for any term not " exceeding 14 years, in possession and not in reversion, " at the best rent," &c. It was admitted upon the argument that a limitation of the freehold premises to trustees, *upon trust to permit another to receive the rents and profits*, will *in general* vest the legal estate in the person who is to receive the rents and profits; and *Broughton* v. *Langley* (Ld. *Ray*. 873.) is an authority in point that it will. But it was contended that the power of leasing in this will distinguished this case from that of *Broughton* and *Langley*; that this power extended to the premises in question, as well as to all the other premises devised; and that when the testator gave the trustees this power, he must have understood that he had before given them the legal estate. Upon an attentive consideration, however, of this proviso, it appears that it does not extend, and was not meant by the testator to extend, to the premises in question, but is confined, and was intended to be confined, either to premises which, having been originally *vested* in *them* as trustees under the will, might afterwards become *vested* in *another person or persons*, or to those over which the trustees had power of sale given to them: and if the intention were in this respect even doubtful, it would be sufficient for the plaintiff; because the devise in trust to permit Mrs. *Phillipps* to receive the rents, &c. must have the ordinary effect of such a devise, unless the Court can pronounce affirmatively that it was

1810.

Right, Lessee of Phillipps, against Smith.

the testator's intention to include the premises in question in the power of leasing. The will contains three devising clauses, the second and third of which contain powers of sale; but the first contains no such power, but is in trust to permit the widow to receive the rents till the son should attain 21, and it is then to the use of the son in fee. It is true that the first clause contains leaseholds as well as freeholds; and, as to the leaseholds, the legal estate must be in the trustees; but though the legal estate as to them be in the trustees, it does not follow that the testator intended that they should be included in the power of leasing; and even if they were intended to be included, it does not follow that there was the same intention as to the freeholds. The trustees were to have no control over these premises *for any purposes of the testator's will*, but they were to vest and enure for all beneficial purposes solely to the use of the widow till the son was 21, and then to enure wholly to that of the son; and there is nothing upon the face of the will bespeaking an intention that the mother and the son should not respectively have, in succession, the legal estate, and, if they thought fit, the actual possession: whereas if the defendant be right, and the power extend to these premises, the trustees might lease them when the son was upon the eve of 21, and might deprive him of the actual possession till he was nearly 35. A construction which would produce such a consequence, without any obvious benefit on the other side, is not to be adopted, unless the words absolutely require it, and which, upon a fair consideration of them, they do not appear to do. The words give the trustees the power of leasing "till all the messuages, &c. devised "to them *upon trust as aforesaid* shall actually become "*vested in some other person*, or until the same shall be "abso-

Legal estate of the leasehold in the trustees.

1810.

RIGHT, Leffee of PHILLIPPS, against SMITH.

" abfolutely fold." The words, " *upon truft as aforefaid,*" are not very definite. They may mean *upon which trufts are to be executed by the truftees,* i. e. *upon which they are to raife money,* &c.: and if that be their meaning here, they do not extend either to the premifes in queftion, or to the leafeholds which were included in the firft devife. The words, " *till they fhall actually become vefted in fome* " *other perfon by virtue of this my will,*" imply that the teftator was contemplating property as to which he had already ufed words which would veft it in the truftees in the firft inftance, and afterwards pafs it beyond them to fome other perfon: whereas he had not before ufed any words as to the property in queftion, which would have that effect. Upon thefe grounds, therefore, that the words here ufed in the devife to *Harriet Phillipps* are fufficient to pafs the legal eftate to her, unlefs the power of leafing controls them; that there are no purpofes expreffed in the teftator's will which a leafe of thefe premifes will advance; that it might materially prejudice the interefts of thofe perfons to whom the will gives thefe premifes to extend the power of leafing to them; and that all the words of the power, and the probable intention of the teftator, may be fatisfied without that extenfion; we are of opinion that *Harriet Phillipps* took the legal eftate in the premifes in queftion, and confequently that the plaintiff is entitled to recover. This is certainly the juftice of the cafe in this action; for Sir *John Kennaway* and the others appear by the firft count to have concurred in the ejectment, though, from a miftake, there is no count upon which they could have recovered, had the legal eftate been in them.

1810.

Wednesday, June 27th.

A proviso in a lease for 21 years, that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, *his executors or administrators*, so to do, upon 12 months' notice to the other of them, *his heirs, executors, or administrators*, extends, by reasonable intendment, to the *devisee* of the lessor who was entitled to the rent and reversion.

Roe, on the Demise of Bamford, *against* Hayley.

IN ejectment to recover messuages and lands at *Wolverhampton*, in the county of *Stafford*, the demise of which was laid on the 26th of *March* 1809, a verdict was taken at the trial at *Stafford* for the plaintiff; subject to the opinion of the Court upon this case.

William Bamford, deceased, being seised in fee of the premises in question, demised them, by an indenture of lease, dated 25th of *March* 1802, to the defendant *Hayley*, his executors and administrators, from the day of the date, for 21 years, at a yearly rent, payable half yearly, on the 29th of *September* and the 25th of *March*, unto the said *William Bamford* his heirs or assigns, subject to this proviso for determining the said lease. "Provided, that if *either of the said* PARTIES shall be desirous to determine this lease at the end of the first 7 or 14 years of the said term, then it shall and may be lawful for either of them, *his executors or administrators*, so to do, upon giving unto the other of them, *his heirs, executors, or administrators*, or leaving the same at his or their place of abode, 12 months' notice in writing of such his or their intention, any thing therein contained to the contrary notwithstanding." *William Bamford* being so seised, afterwards by his will, in *September* 1807, devised the premises to his youngest son *Benjamin B.* (the lessor of the plaintiff,) in fee, and appointed the said *Benjamin B.* and *T. C.* his executors, and died on the 17th of *December* following; leaving *William Bamford* his heir at law. The executors proved the will. On the 3d of *March* 1808 *Benjamin Bamford* alone delivered notice in writ-

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1810.

ROE, Leffee of BAMFORD, *againſt* HAYLEY.

ing, ſigned by himſelf, to the defendant, as follows. Mr. *J. L. Hayley*.—As deviſee in fee under the will of my late father *William Bamford*, deceaſed, and in purſuance of the proviſo in the leaſe of the buildings, lands, and premiſes made by him to you, I hereby give you notice to quit and deliver up to me, at or upon the 25th of *March* 1809, the poſſeſſion of all the buildings, lands, &c. thereto belonging, ſituate in *Wolverhampton*, &c. ſo leaſed by my ſaid father to you." Dated the 26th of *February* 1808, and ſigned *Benjamin Bamford*. If the plaintiff were entitled to recover, the verdict was to ſtand; otherwiſe a nonſuit was to be entered. The caſe was argued in the laſt term.

Abbott for the plaintiff ſtated the queſtion to be, whether the deviſee of the leſſor who made the leaſe were competent within the meaning of the proviſo to give the notice to determine it; and contended that the meaning of the proviſo, though not conveyed in the moſt apt terms, was that the notice ſhould be given by or to the owner at the time of the eſtate, on the one hand, and to or by the perſon intereſted in the leaſe at the ſame time, on the other: and that it could not have been the meaning of either party that ſuch notice ſhould be given to or by a ſtranger to the eſtate, which if the words were conſtrued ſtrictly would be the caſe. For the executor of the leſſor, (which the plaintiff alſo is as well as deviſee) is, *as executor*, a ſtranger to the real eſtate; and the heir of the leſſee would, as ſuch, be a ſtranger to the term. Rent, or a right of entry, or re-entry muſt follow the eſtate, and cannot be reſerved to a ſtranger (*a*). In *Sacheverell* v. *Froggatt* (*b*),

(*a*) *Lit. ſ.* 347. (*b*) 2 *Saund.* 370.

1810.

Roe, Lessee of Bamford, against Hayley.

a reservation of rent during a term of years to the lessor, *his executors, administrators, and assigns*, was held to extend to a devisee who sued the lessee upon his covenant. There indeed was the word *assigns*, which would be taken to include a devisee: but a reservation of rent to tenant in tail and his *heirs* will by intendment of law carry the rent with the estate to the *heir in tail* (*a*). So where a feoffment is made on condition, the law allows him who hath interest in the land, as a sub-feoffee, as well as the party or parties privy to the condition, to perform it and save the estate (*b*); and the like rule holds of a mortgage on condition to be performed by the mortgagor and *J. S.* before a certain day, where if either of them die before the day, the condition may be performed by the other alone (*c*). In like reason, by analogy to the rule in those cases, the words of this proviso, which speak of the notice to be given by either of the said *parties* desirous of determining the lease, his *executors* or *administrators*, to the other, his *heirs*, *executors*, or *administrators*, must be taken to mean generally all the *representatives* of either party standing in privity to their respective estates and interests.

Williams Serjt. *contrà* admitted, that by the rule of the common law no entry could be reserved to a stranger, but denied that a devisee stood in a different predicament. The *st.* 32 *H.* 8. *c.* 34. (*d*), was the first act which gave power to an assignee of the reversion, as a devisee is, to enter on the lessee for a condition broken: but that does not apply to this case, which stands upon the words of the proviso. Then it is admitted that a devisee does not

(*a*) 1 *Ventr.* 162. and *Lit. s.* 347.
(*b*) *Lit s.* 336. and *Shep. Touch.* 137.
(*c*) *Co. Lit.* 219. *b.*
(*d*) Vide *Co. Lit.* 215. *a.*

come

come within the words; and there is no authority for construing them in the large and general sense contended for. The distinction is taken in one of the books cited (*a*), between conditions to defeat and conditions to preserve an estate; the former are always construed strictly; and the present case is of that description: the authorities cited are instances of the latter description. The estate of the lessee can only be defeated in the very mode stipulated for in this lease, which has not been pursued.

Abbott in reply said that the proviso was introduced for the equal benefit of both parties, for either may determine the lease; and therefore was not to be governed by the strict rule of construction in cases of forfeiture or conditions broken, which are to determine an estate for the benefit of the grantor only.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. The only question in this case was upon the validity of a notice for determining a lease. *William Bamford*, being seized in fee, demised the premises in question to the defendant for 21 years from *Lady-day* 1802, subject to this proviso, "that if either of the "said parties shall be minded and desirous to determine "this lease at the end of the first 7 or 14 years of the "said term, then and in such case it shall and may be "lawful for either of them, *his executors or administrators*, "so to do, upon giving unto the other of them, *his heirs*, "executors or administrators, 12 months' notice, in "writing, of such his or their mind or intention." *William*

(*a*) Vide *Co. Lit.* 219. *b.*

1810.

Roe, Lessee of Bamford, against Hayley.

Bamford devised to the lessor of the plaintiff in fee, and made him and one *Cheshire* executors of his will, and died. On the 3d of *March* 1808 the lessor of the plaintiff gave notice in his character, and by the name and description of "devisee in fee under the will of his late father *William Bamford*, deceased," for putting an end to the lease of *Lady-day* 1809, in pursuance of the proviso therein contained; and it is upon the validity of the notice thus given by him that the case depends. It is contended on the part of the defendant, that this proviso is to be looked upon as a condition to defeat an estate; that it ought therefore to be strictly and literally pursued; and that as it gives no power, in terms, but to *the parties, their executors or administrators*, it does not warrant a notice by a *devisee*. On the other hand it was urged, that this was intended as a privilege or power to accompany the estate of the lessor on the one part, and of the lessee on the other, into whatsoever hands it might pass; and that the words "*executors and administrators*" were put for representatives in general; and that a notice might be given by *an assignee* of either party, or by *the heir or devisee* of the lessor, as well as by the parties themselves, their executors or administrators: and this we think the right construction. The object of such a proviso manifestly is that the inheritance should not be bound on the one hand against the will of the persons to whom the inheritance belongs; and that, on the other hand, the lessee and those claiming under him should not be bound gainst their will; but that in all instances the parties interested, whosoever they might be, should have power to give the necessary notice for this purpose. The intention was not to give a collateral power, to be exercised by a stranger, but to annex certain privileges to the term

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and to the reversion, to pass with such term and with such reversion respectively, and to be exercised by the persons, whosoever they might be, to whom such term or reversion should come. The right respects the interest demised; and according to the rules which ascertain whether a covenant is to be deemed to run with the land or not (*a*), would be considered as annexed to the reversion on the one hand, and to the term on the other. A covenant by a lessor that he would renew at the end of his term has been adjudged to run with the land and to bind the grantee of the reversion (*b*); and there is no substantial difference, in point of construction, between a stipulation for extending the term, and a stipulation for shortening it. So a covenant to renew at the request of the *lessee* has been held in equity to run with the estate, and to oblige the lessor to renew at the request of the *lessee's executors*; there being nothing in the lease to shew that the renewal was intended to be confined personally to the lessee, and it being considered that the executors were identified with the lessee (*c*). If the proviso in this case is to be construed literally, what will be the consequence? If the lessee or his executors assign, such assignee cannot give the notice, because he is not within the words; but if any notice is to be given on his part, he must procure it to be given by the lessee or his executors: and for the same reason, if the lessor die, his heir or devisee cannot give it; but, if any notice in such case is to be effectual, it must be from the executors or administrators of the lessor. Now it never could be intended that the right of determining the term should be

(*a*) 5 *Rep.* 16. and 3 *Wilf.* 27. were referred to.
(*b*) *Moor*, 159. was mentioned; and see upon the same subject *Isteed* v. *Stoneley*, 1 *And* 82.
(*c*) *Hyde* v. *Skinner*, 2 *Pr. Wms.* 196.

taken

1810.

Roe, Lessee of Bamford, against Bayley.

taken from the only persons interested in it, and given to a mere stranger, having no interest in it whatever. We therefore think the true construction of this proviso is not according to the letter, but according to the spirit; and that we may adopt the expression in *Dyer* 15. *a.* "that in "every deed and condition which are private laws between "tween party and party, a reasonable and equal inten- "tion shall be construed, although the words sound to a "contrary meaning." An additional argument in favour of the construction we adopt may be drawn from the latter part of the proviso, which says, that the notice shall be to the other, his *heirs*, executors, or administrators; so that though it in terms requires notice from the party, his *executors or administrators*, it allows it to be given also to *heirs*, which furnishes a fair ground for supposing that the word *heirs* was before omitted merely by a mistake in the enumeration of the different classes of representatives of the original parties to the lease. And if the word *heirs* be thus supplied in the former part of the proviso, on the ground of a supposed omission by mistake, a devisee, as *hæres factus*, would be in like manner supplied or introduced by reasonable intendment and construction arising out of the terms and object of the same instrument. Upon the other ground, however, we are clearly of opinion, that the proviso extends in reasonable construction to *all* representatives; and consequently that the notice given was sufficient to determine the lease. The postea therefore must be delivered to the plaintiff.

1810.

COLE and Others, Assignees of DOYLE, a Bankrupt, against PARKIN.

Wednesday, June 27th.

The stat. 26 G. 3. c. 60. s. 17. avoiding a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry; where parties by mistake mis-recited in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed delivered de novo: held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been.

IN trover for a ship, which was tried before Lord *Ellenborough* C. J. at *Guildhall*, the plaintiffs proved a bill of sale of the ship executed by the defendant to *Doyle*, the bankrupt, on the 26th of *June*, in which, by mistake, as it afterwards appeared, the certificate of registry was recited to have been granted at *Guernsey* instead of *Weymouth*, where it was in fact granted; but when it was sent down to *Weymouth* to be registered by the proper officer there, the mistake was discovered after some time, and it was returned again to the parties on the 5th of *September*, and then the mistake was rectified with the consent of both parties, by striking out *Guernsey* and inserting *Weymouth*, and the deed was re-executed and delivered de novo, but without any new stamp. It appeared further that the ship was in port on the 26th of *June* when the bill of sale was first executed, and remained there till the 30th, when she sailed; and she was out of port when the deed was re-executed, on a voyage in which she was afterwards lost at sea, and on which she had been sent by the defendant. On the objection being taken of the want of a new stamp, the plaintiffs were nonsuited at the trial, with leave to move to set the nonsuit aside: and a rule nisi having been granted for that purpose in last *Hilary* term, cause was shewn against it in the same term by

The Attorney-General and *Marryat*, who urged that the instrument after the first execution of it was perfect upon the

1810.

COLE *against* PARKIN.

the face of it, and was only proved to be inoperative by extrinsic circumstances. The vendee used and acted upon it in this state by sending it to *Weymouth* and attempting to get it registered there. If one alteration of this sort, especially in a material part, were allowed upon the same stamp, the instrument might be altered in every part of it, even in the name and description of the ship, so as altogether to make it a new instrument; and it would often be difficult in these cases to distinguish between alterations arising from mistake and those from design, which would open a door to frequent evasions of the stamp duties. Suppose where the stamp is calculated by the number of words, it was found, after the execution of the deed, that the number of words exceeded the allowance; could some superfluous words be struck out, and the deed be re-executed without a new stamp? If so, then in the case of annuities, or bargains and sales, which are to be enrolled within a certain limited time after execution, the second execution would give the instrument a new date, from whence the time for enrolment would be calculated: and yet if a new date be given to a bill of exchange, that has been held to require a new stamp (*a*). [*Le Blanc* J. That is not the correction of a mistake, but the case of a new instrument intended to be made.] In another case (*b*) where a broker by mistake made a policy of insurance on *ship and outfit*, instead of ship *and goods*; yet when it was corrected, it was held to require a new stamp. [*Le Blanc* J. That was a purposed alteration after the contract had been entered into with those who meant at the time what was first expressed.] In this case the ship having been in port when the deed was first ex-

(*a*) Vide *Bowman* v. *Nichol*, 5 *Term Rep.* 537.
(*b*) *French* v. *Patton*, 9 *East*, 351.

ecuted,

ecuted, and out of port when the alteration was made, a different law had operated upon her, as to the time within which the regiſtry was to be made; for by *ſ.* 15. of the ſtat. 34. *G.* 3. *c.* 68. when the veſſel is in port at the time of the transfer, the indorſement of it on the certificate of regiſtry is to be *forthwith* made; but if at ſea, then it is to be made within ten days after her return to port. A miſtake of a name in a deed whereby a trader conveyed away all his property would ſtill be an act of bankruptcy; and if the vendor, a trader, had had no other property than this ſhip, it would have that operation, though the requiſites of the regiſtry acts had not afterwards been complied with by the vendee; otherwiſe it would be in his power to make it an act of bankruptcy or not in the vendor.

Park and *Scarlet*, contrà, ſaid that in every caſe where a new ſtamp had been held neceſſary upon the alteration of an inſtrument, the inſtrument was good upon the face of it, and valid between the parties; but here it had no validity till properly regiſtered, and there could be no regiſtration of the ſhip at *Guernſey*; the invalidity of it therefore appeared upon the face of it. This is a mere clerical miſtake in copying the certificate of regiſtry, and it has never been held that the correction of mere clerical miſtakes, upon whcih the parties re-execute the inſtrument, requires a new ſtamp; and yet in many caſes of clerical errors, it has been held to have an operation between the parties, according to their manifeſt intent. Where a deed contains too many words, it is the fault of the parties, who muſt look to that at their peril; but it cannot be ſaid that the words uſed were not intended to be uſed; but if the ſuperfluous words were inſerted

1810.

Cole *against* Parkin.

ferted by miftake of the copyift unknown to the parties, the cafe would be different; as fuppofe the fame words were twice written. Clerical miftakes in deeds may be averred in pleading, and the deed will be good, though left uncorrected. The prefent cafe is the ftronger in favour of admitting the alteration, becaufe the conveyance of the fhip was not complete until the regiftration of the bill of fale, and before that was completed, the alteration was made.

Lord ELLENBOROUGH C. J. at the conclufion of the argument faid it was a cafe of general confequence beyond the value in difpute between thefe parties, and it would therefore be proper for the Court to take it into further confideration before they delivered their opinion, with a view to fome general rule. And in this term his Lordfhip proceeded to give the opinion of the Court.

The only queftion in this cafe was whether an alteration in the bill of fale of a fhip made a new ftamp neceffary. The bill of fale was originally executed on the 26th of *June*; but in reciting the certificate of regiftry it ftated *Guernfey* as the port where the certificate was granted inftead of *Weymouth*. It was fent down to *Weymouth* for regiftration, and returned the 5th of *September*, and then the miftake was rectified by confent of all parties, and the deed delivered de novo. And whether this fecond delivery made a new ftamp neceffary was the queftion referved for the further confideration of the Court. And upon fuch further confideration, we are all of opinion it did not. By ftat. 26. *G.* 3. *c.* 60. *f.* 17. a bill of fale of a regiftered fhip, "which does not truly and "accurately recite the certificate of regiftry in words at

"length, ſhall be utterly null and void to all intents and "purpoſes." And it has been decided upon this clauſe, that a bill of ſale not conformable to it is ſo completely void that a ſtranger may inſiſt upon its inſufficiency; (*Weſterdell* v. *Dale*, 7 *Term Rep*. 306,) and that it gives no title even in equity. (*Camden* v. *Anderſon*, 5 *Term Rep*. 709—711., and *Hibbert* v. *Rolleſton*, 3 *Bro. Ch. Caſ*. 571.) This bill of ſale, therefore, when firſt executed was, from the miſtake in the recital of the certificate of regiſtry, to all intents and purpoſes null and void: it took no effect whatever from its firſt delivery; and the ſtamp impreſſed upon it was wholly inoperative. This defect aroſe, not from intention, but from miſtake. The inſtrument, as firſt executed, was not what the parties meant to execute, and it was not in the ſtate in which it was at firſt intended to be, till it was altered. This is not the caſe of ſubſtituting a new and ſecond contract, in the place of a preceding effectual one, upon a change of intention in the parties; but merely making the contract what it was originally intended to have been: and in ſuch a caſe, where the inſtrument upon its firſt execution was void to all intents and purpoſes; where its inſufficiency aroſe from a mere miſtake; where in conſequence of that miſtake it was not in the ſtate in which it was intended to have been when it was ſo executed; and where upon its ſecond execution it is only put into that ſtate in which it was originally intended to have been; we think it is not going beyond the fair ſpirit of the ſtamp laws to hold that upon ſuch ſecond execution, being the firſt which was effectually operative, a new ſtamp was not requiſite. *Kerſhaw* v. *Cox* (3 *Eſp. N. P. Caſ*. 246.) was a ſtronger caſe than this; for there the bill of exchange was available in the hands of the payee, though not negotiable

1810.

COLE *against* PARKIN.

gotiable for want of the words "or order;" and the miftake in omitting thofe words was not difcovered till after the bill had been in fact indorfed and negociated by the payee, when they were inferted by the confent of all parties; and this Court, in Lord *Kenyon*'s time, held that a new ftamp was not neceffary on fuch alteration. In *Knill* v. *Williams*, (10 *Eaft*, 431.) where a note was altered the day after it was made, by ftating what was the confideration for it, viz., the goodwill of a leafe and trade, the Court held a new ftamp neceffary: but that was, becaufe it did not appear to have been the original intention that the confideration fhould be ftated, but it was clearly an after-thought; and the cafe was faid not to be like *Kerfhaw* v. *Cox*, "where, by miftake as it ap-"peared, the bill had not been drawn according to the "intention of the parties at the time, and it was brought "back the next day to *Kerfhaw*, the drawer, to have the "imperfect execution of it perfected." In this cafe this bill of fale was, by miftake, drawn contrary to the intent of the parties at the time, inafmuch as they meant that the certificate fhould be truly recited; and the fecond execution of the deed only perfected what was before imperfect. We are of opinion therefore that in this cafe the nonfuit fhould be fet afide, and a new trial granted.

The KING *against* The Commissioners of Compensation under the LONDON Dock Acts.

Wednesday, June 27th.

The compensation clause in the *London* Dock act, reciting that divers tenements, &c. may become less valuable by the trade being diverted therefrom, provides that in case they do so, or the *owners* or *occupiers* suffer loss by the dock works, the commissioners shall make them compensation; and no claim is to be made for compensation till three years after the opening of the docks; and then it is to be made within a given time: held that where the owner of the inheritance of a tenement which was in lease died after the three years from the opening of the docks, without having made any claim, her devisee, and not her executor, was entitled to claim within the time allowed compensation for an injury done by the dock works to the inheritance in the time of his testatrix.

LORD ELLENBOROUGH C. J. delivered the judgment of the Court in this case, which had stood over for consideration.

This was an application for a mandamus to the commissioners of compensation to proceed upon a claim preferred by *Thomas Brown*. The property, in respect of which the claim was made, belonged to a Mrs. *Hodson* till her death, which happened in *June* 1808, and Mr. *Brown* is entitled for life under Mrs. *Hodson*'s will. The *West India* Docks were opened in *August* 1802, and the *London* Docks in *January* 1805; and by the acts (*a*) for founding those establishments no claim could be made for compensation *till 3 years after the docks had been opened;* and the claim was then to be made, in some instances within one year, and in others within two. The claim has been resisted on the ground, that as the docks had been open three years before Mrs. *Hodson* died, the injury for which compensation was to be made was complete in her time, and the property passed to Mr. *Brown* in its deteriorated state; that Mr. *Brown* therefore had no claim to compensation; and that if any claim could be made it could only be by Mrs. *Hodson*'s executors. On the other hand it has been urged that the executors could support no claim for an injury to the reversion and inheritance, which this is; and that unless Mr. *Brown* and Mrs. *Hodson*'s

(*a*) 39 *Geo.* 3. *c.* 69. and 39 & 40 *Geo.* 3. *c.* 47.

1810.

The KING against The Commissioners of Compensation for the LONDON Docks.

son's devisees can support the claim, no other person can. It appears by the claim that the chief part of the premises were under lease from the time the dock acts passed till after Mrs. *Hudson* died; so that the only claim she could have made must have been purely for the injury to the inheritance; and it is difficult to say, upon legal principles, that for such an injury any claim could have been made by an executor. The compensation clauses (which are nearly the same in all the acts) recite that divers tenements, &c. may become less valuable by the trade being diverted therefrom, and divers *owners* and *occupiers* may thereby sustain loss or damage; and they provide that in case such tenements be rendered less valuable by the trade being diverted therefrom, or the owners or occupiers suffer loss or damage by the works of the docks, the commissioners shall make them compensation for the loss or damage they shall have thereby suffered. These clauses do not provide in terms for such a case as this, where the owner dies after the three years are completed, without having made any claim; nor can I find any clause or expression in the act which throws light upon the point. It must have been intended that in every case where the property was injured there should be a compensation; and if no claim can be made by Mrs. *Hudson*'s executors, it seems to follow that the claim by Mr. *Brown* may be supported. He is "*owner*" at the time he makes the claim; and there is nothing in the acts which expressly and in terms confines the claim to persons who were owners either when the acts passed, or within the three years. The right to claim may be considered in this instance, where there is no other person to answer the character of owner, to pass with the land. This is not the case of an owner sell-

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1810.

The KING against The Commissioners of Compensation for the LONDON Docks.

ing his estate after the three years have elapsed, without expressly selling the right to compensation; for as, in the case put, he sells it in its deteriorated state, he may be considered as reserving the right of claiming compensation; but here Mr. *Brown* answers the character of owner of the deteriorated property, and which had received its damage within the three years, and there is no other person who can claim in opposition to him. Mrs. *Hodson* might have made the claim in her own life time: she might perhaps have given contingent directions by her will as to the produce of such claim, if allowed; but as she has not done so, the right must, we think, be considered as passing with the estate; and consequently that the rule for the mandamus ought to be made absolute.

The KING *against* SHAW.

Wednesday, June 27th.

Upon an appeal against a rate, made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the Sessions, that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common form, was produced in court by the appellants; and the Sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the Sessions to receive the appeal for want of proof of the printed copy having been examined with the rolls of parliament; this Court refused to quash their order, which was removed by certiorari.

AT a Quarter Sessions holden for the West Riding of the county of *York* it was ordered as follows:— "Upon hearing the appeal of *W. Green* and *R. Wilson* against the assessment of *W. Shaw*, dated the 1st of *May* 1809, made by him under the authority of the *Wakefield* inclosure act, to defray damages occasioned by the working of the Duke of *Leeds*'s colliery; it is ordered that the said assessment appealed against be quashed, and the case

1810.

The KING against SHAW.

hereunto annexed granted by the Court for the opinion of the Court of *K. B.*" "At the general Quarter Sessions held at *Wakefield* for the W. R. of the county of *York*, on *January* 11th 1810, an appeal came on to be heard in which *Green* and *Wilson* were appellants, and *Shaw* respondent. This was an appeal against an assessment made under a clause contained in a private act of parliament; a printed copy of which was offered in evidence, without any proof of its having been examined with the rolls of parliament. The Court decided that such proof was not necessary, and admitted the copy to be received in evidence, both parties being interested under the act of parliament."

This order with the case being removed into this court by certiorari at the instance of the defendant, he obtained a rule calling on the appellants to shew cause why the order of sessions "made on the appeal of *W. Green* and *R. Wilson* against the assessment of the defendant, dated the 1st of *May* 1809, made by him under the authority of the *Wakefield* inclosure act, to defray damages occasioned by the working of the Duke of *Leeds's* colliery, should not be quashed for insufficiency, &c."

Parke and *Lambe* shewed cause against the rule, and contended that it was not competent to the defendant, who had made the rate under the act in question, which gave the appeal, to call upon the appellants at the sessions to prove their right to appeal by giving strict legal evidence of the act, as a private act: for it is a general rule that where both parties claim under the same authority, neither can object to it. [*Le Blanc* J. Is not the respondent to begin, by shewing that he had a right to make the rate under the act?]

Holroyd,

1810.

The King against Shaw.

Holroyd, contrà. The defendant only admitted that he had made the rate under a certain act of parliament; but he did not admit the authority of the appellants to appeal to the sessions against his rate: when therefore they did appeal, he had a right to object that the sessions had no jurisdiction to receive such an appeal, and to call upon the other parties to prove it. In *Rex* v. *The Mayor, &c. of Liverpool* (a), an inquisition taken by virtue of a private act of parliament before the sheriff of *Lancashire* was, on its being removed by certiorari into this court, quashed; because it did not set out that certain notices had been given to the parties interested, without which the sheriff had no jurisdiction; and the Court would intend nothing in favor of an inferior jurisdiction.

Lord ELLENBOROUGH C. J. The appellants by their appeal assumed that the sessions had jurisdiction: the respondent, if he meant to deny their jurisdiction, might have staid away; but he followed the appellants to the sessions and appeared there to defend his rate. Then in a case like this the sessions did right in calling upon both parties to say whether they claimed to act under the same act of parliament: and if the respondent admitted that he made the rate under the act which was produced, it is in derogation of justice and a disgrace to the administration of the law to take such an objection. And the sessions having over-ruled it upon that admission, and gone into the merits, we will not disturb their decision.

Rule discharged.

(a) 4 *Burr.* 2244.

1810.

Wednesday, June 27th.

The KING *against* The Inhabitants of MILDENHALL.

A servant, 11 weeks before the end of his year, on a quarrel with his master, applied for his *discharge*, which the master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day labourer for the remainder of the year: held that this was proper evidence from whence the might draw the conclusion of a dissolution of the contract; though it was encountered by the evidence of the servant, that his master said to him at the time, that if the other man did otherwise than well, he could send for the servant and make him serve out his time; to which the latter assented: which account was, in the judgment of the Sessions, impeached by the master's having no recollection of having so said, and saying that he had not any *intention* to have the servant back, they having parted on bad terms; which latter expression the Court received, not as evidence per se of the master's *intention*, but only as a reason assigned by him why he was not likely to have said what the servant stated.

WILLIAM *Dowling*, his wife, and three children, were removed from the parish of *Wilcot* to that of *Mildenhall*, both in *Wilts*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

The pauper being settled at *Mildenhall*, at *Michaelmas* 1803, agreed with *J. Stratton* of *Wilcot* to serve him for a twelvemonth at *6s.* a week in the winter, and *6s. 6d.* in the summer; with an allowance of small beer and lodging all the year, and victuals during the harvest. He went into the service at *Old Michaelmas*, and served his master at *Wilcot* till *July*, within eleven weeks of the expiration of the year. The pauper not behaving as he ought, and neglecting his business, his master and he had a dispute, in consequence of which the pauper asked his master to discharge him; but he answered he would not, unless the pauper would get another man to stand in his stead. The pauper accordingly got *W. Racey*, to whom he agreed to give a guinea and a half out of his own pocket, to take his place, besides his wages, which were to be paid to him by *Stratton*, the master. The pauper stated, that when he brought *Racey* to his master, he said, "If this man does any otherwise than well, I can send for you and make you serve your time out:" to which

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the pauper replied "very well." On the contrary the master stated, that "he did not recollect having said to "the pauper that he should expect him to return; that "it was not his intention to have him back; and that "they parted on bad terms." The guinea and a half was paid by the pauper to *Racey* at the time he entered the service, and *Racey* served out the remainder of the year with *Stratton* at *Wilcot*, and received the wages from him for that time. The pauper during the remainder of the year hired himself as a day-labourer in the adjoining parish, and occasionally slept at *Wilcot*. *Racey* continued to serve *Stratton* under a new agreement till the end of the year.

Casberd and *Merewether* were to have argued in support of the orders; but the Court thought it unnecessary to hear them. *Le Blanc* J. observed that there was contradictory evidence before the sessions, whether this were a dissolution of the contract, or a dispensation of the service; and the Sessions had decided upon it as it was their province to do.

Burrough, *Gaselee*, and *Gunning*, contrà, objected that the sessions had received illegal evidence from the master, that it was not his *intention* to have had the pauper back again; by which they had been misled. They urged too that there was no contradiction in the evidence; for the master did not deny the pauper's statement, but only did not *recollect* it; and according to the testimony of the latter, the settlement was clearly established in *Wilcot*. The master insisted on keeping the pauper to his contract; he merely dispensed at the time with his personal service, but obliged him to procure a substitute; and said that if

1810.

The King *against* The Inhabitants of Mildenhall.

the substitute did not behave well, he should expect the pauper to return; and the pauper paid the expence of the substitute. [*Bayley* J. asked if there were any case where the pauper had been held to gain a settlement by hiring and service, where after leaving his master during part of the year he had actually hired himself to another master?] They referred to *Rex* v. *Goodnestone* (*a*), where the master consented that the pauper should go to the herring fishery (where he must have served somebody else), if he could get a man to do his work to the master's liking; which the pauper did, and paid the man; and did not return till after the year: and yet he was held to gain a settlement by such hiring and service. And here the pauper, having only hired himself as a day-labourer, was at liberty to return at any time into the master's service when called upon.

Lord Ellenborough C. J. The case of *The King* v. *Goodnestone* was an express case of dispensation of service, and the servant might have returned within the year. But let us see whether in this case the justices might not reasonably draw the conclusion which they have done, that what passed between the master and servant was a discharge of the latter. The pauper in consequence of his ill behaviour had a dispute with his master, and desired to be discharged: the master refused, unless the pauper would get another man to stand in his stead: another man was accordingly procured and brought to the master. And then according to the pauper's evidence the conversation between them is this:—The master said, "If this man does otherwise than well I can send for you and make you

(*a*) *Burr.* S. C. 251.

serve

1810.

The King against The Inhabitants of Mildenhall.

ferve your time out." The pauper anfwered "very well." *In contradiction* to this evidence, (for fo the feffions muft be taken to have underftood it by the manner of their ftating the cafe; for they fay *on the contrary*,) the mafter fwore that he had no recollection of having faid to the pauper that he fhould expect him to return. This was evidence to impeach what the pauper had fworn, of which the feffions were to judge: and then what follows is not giving evidence of the mafter's *intentions*, but is merely ftated by the mafter, in confirmation of his accuracy, in not recollecting what the pauper had ftated him to have faid; as if the mafter had faid that what confirmed him in fuppofing that no fuch converfation paffed was, that he had no intention to take the pauper back. The feffions evidently underftood what the mafter faid as importing a contradiction to the evidence of the pauper: and can we fay that they did wrong in drawing that conclufion? The pauper then left the fervice eleven weeks before the expiration of the year; the mafter agreeing to his difcharge, upon his getting another man to ferve in his ftead, whom he did procure, and who did accordingly ferve: and the pauper himfelf entered into another fervice. And though it is faid that the pauper might have returned at a day's notice if recalled, I do not think that varies the cafe. According to the mafter's account, it was a cafe of diffolution of the contract; and the feffions have drawn that conclufion, and we cannot fay that it is wrong.

Grose J. The pauper upon the quarrel with his mafter applied for his *difcharge*: the mafter refufed, unlefs upon condition that the pauper procured another perfon to ferve in his ftead; and the pauper complied with the condition:

1810.

The King against The Inhabitants of Mildenhall.

condition. And then the Sessions, contrasting the master's evidence with the pauper's, have drawn the conclusion that he was discharged, and that the contract was dissolved; and we cannot quarrel with that conclusion which it was competent for them to draw.

Le Blanc J. Though the statute has said that no settlement shall be gained by a servant unless there be a contract of hiring for a year and a service for a year, yet the cases have decided that if the servant be absent from the service any part of the year with the leave of his master, he shall still gain a settlement. Therefore it always becomes a question of fact in these cases, whether the absence be accounted for by a dispensation of the service or by a dissolution of the contract of hiring. Here the Sessions have concluded that the contract was dissolved; but they have also stated the evidence on which they drew their conclusion; and we are now called upon to say whether that conclusion were wrong. The pauper and his master quarrelled: the pauper applied to be discharged: the master objected, unless the pauper got another man to stand in his stead; he therefore consented if the pauper did get another man: the pauper got another man who served out the time. Was it not competent for the Sessions on these facts to conclude that he was discharged? But the pauper was asked what passed at the time; and he said that his master said that if the man did otherwise than well, he (the master) could send for the pauper and make him serve out his time; to which the pauper assented. The master however, when questioned did not recollect any such thing to have passed, and he assigned a reason why it could not pro

bably

1810.

The KING against The Inhabitants of MILDENHALL.

bably have paſſed: and the ſeſſions, taking the whole together, conſidered his evidence as a contradiction of what the pauper had ſworn to have paſſed, and drew their concluſion accordingly; by which it appears that they did not give credit to the pauper's account. Then it is ſaid that the pauper only engaged as a day-labourer, and could have returned again into the ſervice if recalled: but that is no confirmation of his account; for the time of year did not render it likely for him to engage in any other kind of ſervice. There is nothing therefore to ſhew that the concluſion drawn by the ſeſſions was wrong; and unleſs we could ſee clearly that it was ſo, we ſhould not reverſe it.

BAYLEY J. There was conflicting evidence for the ſeſſions to decide upon; and this being a matter of fact rather than of law, and they having drawn their concluſion from the evidence, we cannot ſay it is wrong.

Orders confirmed.

1810.

Friday, June 29th.

Goods insured upon a valued policy having been seized, confiscated, and sold, by order of the enemy's government, on their own account, but the necessary documents to verify the loss not having arrived here; the underwriters, on application to pay their subscriptions agreed to adjust and pay immediately 50*l.* per cent. *on account*, but *no abandonment* was made by the assured; and in the mean time the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of *half* the proceeds of the goods which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy: yet held that the underwriters were not entitled to recover back the 50*l.* per cent. they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50*l.* per cent. he had received; and there having been no abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern.

TUNNO *against* EDWARDS.

THE plaintiff declared on the common money counts, and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, took a verdict for 100*l.*, subject to the opinion of this Court upon a special case.

In *July* 1807 the defendant shipped 60 hogsheads of sugar on board the *Wildeman* at *London* for *Rotterdam*, and effected an insurance thereon against all risks whatever, and until safely landed and warehoused in the warehouse of the consignee at *Rotterdam*; such sugars having, with the charges, cost him 1543*l.* 18*s.* 10*d.*, and being valued at 1500*l.* in the policy, which was in the usual form, allowing the assured to sue, labour and travel, &c. for the recovery of the goods insured, and to call on the underwriters to contribute to the charges thereof. The plaintiff was one of the underwriters upon this policy, for 200*l.* The *Wildeman* sailed on the voyage insured under a licence for that purpose from the *British* government, and in *August* 1807 arrived at *Rotterdam*, where the whole of her cargo (together with the cargoes of other vessels from *Great Britain*) was seized before landing, and afterwards confiscated and sold by the orders and for the account and benefit of the government of *Holland*. In *December* 1807 the defendant applied to the plaintiff and the other underwriters on the policy for the payment of their subscriptions; but no documents to verify the loss having at that time arrived in *England*, the plaintiff

and

1810.

TUNNO against EDWARDS.

and the other underwriters agreed with the defendant, that 50*l.* per cent. ſhould be paid him immediately on account: and an adjuſtment was thereupon indorſed on the policy, and ſigned by the plaintiff and the other underwriters as follows; "adjuſted a return for loſs of 50*l.* per cent., on account;" and the plaintiff accordingly paid the defendant 100*l.*, being 50*l.* per cent. on his ſubſcription. In *July* 1808, in conſequence of ſtrong remonſtrances made to the *Dutch* government by the ſeveral conſignees at *Rotterdam* of the ſaid ſugars, and of the other cargoes, that government conſented to reſtore half the proceeds of the ſeveral cargoes *which had been ſeized under the decrees againſt trading with* England; amongſt which the *Wildeman*'s cargo was included. The groſs proceeds of the ſaid ſugars amounted to 3866*l.* 10*s.* 11*d.*, the moiety whereof was 1933*l.* 5*s.* 5½*d.*; and from this laſt ſum 378*l.* 4*s.* 5*d.* was deducted for the proper proportion of the freight and charges of ſale, &c., and the balance of 1551*l.* 1*s.* 0*d.* was before the commencement of this action paid at *Rotterdam* to the conſignees of the ſugars, and handed over by them to the defendant. The queſtion was, whether the plaintiff were entitled to recover back the whole or any part of the 100*l.* paid by him to the defendant, under the circumſtances above ſet forth? If he were, the verdict was to ſtand for ſuch ſum as the Court ſhould direct: if otherwiſe, a nonſuit was to be entered.

Marryat for the plaintiff contended, that the underwriter was entitled to recover back the whole of what he had paid, the aſſured having in fact ſince received more than the full amount of the ſum inſured upon the goods;

 and

1810.

TUNNO *against* EDWARDS.

and having received his indemnity from another quarter, by whatever means, was not entitled to receive, or having received, to retain it from the underwriter, according to the principle laid down in *Godfall* v. *Boldero* (a). The feizure and confifcation by the *Dutch* government was in its nature a total lofs at the time; and though there was in fact no abandonment, yet that is not neceffary where the fpes recuperandi is gone; as where the goods are funk at fea. The defendant applied to the underwriters as for a total lofs, which would have been then paid but for want of the neceffary documents; and in the mean time he received the 50*l.* *per cent.* on account; and an adjuftment *on account* always implies an ulterior demand. [*Bayley* J. Suppofe a capture, and after application to the underwriters for payment of a total lofs, but before they fettle it, there is a recapture, does it not ceafe to be a total lofs? Lord *Ellenborough* C. J. After the feizure it remained contingent whether it would be a total lofs or not; and in order to make it fo, fhould not the affured have given notice of abandonment? There was nothing but the poffibility remaining, the fpes recuperandi, of getting back the goods, which could have prevented the payment of a total lofs; for this was a valued policy.] The doubt was whether the feizure were made before or after the goods had got into the warehoufes of the confignees. [*Bayley* J. The payment of the 50*l.* *per cent.* was not intended to vary the rights of the parties.] If there had been a deftruction of half the hogfheads fhipped, or a recovery in bulk of half of them, it may be admitted that the affured would not have been entitled to recover more than half from the underwriters: but to this

(a) 9 *Eaft*, 72.

moment

moment the loss continues total; for the whole of the goods were alike confiscated: and where there has been a total loss, and afterwards a salvage, it matters not how that salvage arose. Now here it is impossible to distinguish the one half in bulk of the goods insured from the other half. Though the *Dutch* government assumed to restore half the proceeds, yet if the assured had only received 20*l. per cent.*, it could not have been said to be more than so much salvage. [*Bayley* J. The 1500*l.* insured was the prime cost with the charges, and the assured stood his own insurer as to imaginary profits.] If the assured be indemnified by any means to the amount of his insurance before the action brought, he cannot recover. [Lord *Ellenborough* C. J. If he have lost a moiety of the value of the thing insured, is he not entitled to his indemnity for that? The superior value of the other moiety arises from the mere accident of the market. But is it not an established and familiar rule of insurance law, that where the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss, there must be an abandonment? Now here, after the seizure, and pending the application of the claimants to the *Dutch* government, it remained uncertain whether there would be a total loss or a partial remuneration; and there having been no abandonment before the action brought, and it now appearing that there has been a loss of half, and that the underwriter has only paid 50*l. per cent.*, which is his proportion of the loss, how can he recover it back again? *Bayley* J. This was either a gift of half of the subject matter of insurance by the *Dutch* government to the owners of the goods, or an abandonment to them by that government of half the confiscation; i. e. of half the goods. Lord *Ellenborough* C. J. The date of the confiscation

1810.

TUNNO *against* EDWARDS.

confiscation does not appear; therefore I must consider the goods as subsisting in specie till the time when they were directed to be sold, and half the proceeds paid to the claimants.] It must be taken upon the facts stated that the confiscation was immediately upon the arrival of the goods, the trade with *England* being prohibited. [*Bayley* J. Supposing the *Dutch* government had returned the whole of the proceeds, would the underwriters have been entitled to recover the whole sum?] They would: but having only made a payment of 50*l.* *per cent.*, the underwriters stand in the situation of the purchasers of half. [Lord *Ellenborough* C. J. It never was contended before, and there is no principle on which it can be contended now, that an underwriter who has paid so much per cent. on a partial loss is a purchaser of the goods pro tanto.] Suppose the assured had brought his action on the policy in *December* 1807, at which time no salvage had been received, he must either have recovered a total loss or nothing: if he had then recovered or were paid his 100*l.* per cent. the underwriter would have been entitled to the full salvage whatever it might have been; but instead of that he entered into an arrangement with the underwriters, by which he received 50*l.* per cent. as for half of the goods insured. Now in fact all the goods have been lost by the confiscation, but the assured has received back by half of the actual proceeds the full sum insured, and therefore can have no claim against the underwriters upon a mere contract of indemnity. [Ld. *Ellenborough* C. J. Half the proceeds and the proceeds of half the goods are the same thing. *Le Blanc* J. The case of *Godsall* v. *Boldero* was not like a mercantile insurance, for there could be no ulterior profit.]

Lawes,

Lawes, contrà, was stopped by the Court.

1810.
TUNNO against EDWARDS.

Lord ELLENBOROUGH C. J. This is a case where the underwriter, having been paid 50*l.* per cent. on a loss, brings an action to recover it back. The goods insured were seized and confiscated by the enemy, and while it remained uncertain what would be the ultimate event, the assured applied to the underwriter, and he, contemplating his own liability to a greater amount in the event, agreed to pay 50*l.* per cent. in the mean time: but it turned out that on application to the *Dutch* government by the consignees of the goods, such restitution was agreed to be made by that government as leaves to the assured no further claim upon the underwriters. Having therefore received half the sum insured from the underwriters, and half the proceeds from the *Dutch* government, and the assured being thereby fully indemnified, he could not, according to the principle which we laid down in *Godsal* v. *Boldero*, maintain any action against the underwriters. But now though the assured has lost half his goods, and only half, and the underwriter has paid but for half, the latter claims to be repaid his 50*l.* per cent., upon the ground that this was a total loss, and that the assured has received the full value of the sum insured out of the proceeds of the other half: but in order to have made it a total loss, there ought to have been an abandonment, which there has not been; therefore there is no ground for the underwriter's claim.

The other Judges assented.

Postea to the Defendant (a).

(a) Vide *Allwood* v. *Henkill*, *Park*, 6th edit. 239. *Johnson* v. *Sheddon*, 2 *East*, 581.

Friday, June 29th.

PULLER and Another *against* HALLIDAY.

Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburgh*, and there immediately receive a return cargo from the freighters' agent, and bring it to *London*; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. P.* 40 running days without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London* or any port in *England*: and the ship not having been permitted to unload at *St. P.* by the *Russian* government, the master, after waiting there the 40 running days, loaded a *return* cargo *for his own benefit* upon the outward cargo, both of which he brought home, and earned new *freight on the homeward cargo*; which freight was adjudged to him by the judgment of the Court of *C. B.* in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party; held that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to *pay a loss in case the master should not be allowed by the* Russian *government to unload the outward cargo at* St. P; *the vessel having sailed chartered by the freighters on a voyage from* London *to* St. P. *and back*: and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, and adjudged to him by *C. B.*; they having agreed with the assured pending this action, and pending the action in *C. B.* that in case the plaintiffs (to whom they had paid a per centage loss) should not be able to obtain so large an allowance as the full return freight paid to the master *by reason of any demurrages or expences being allowed against the said freight*, the difference should be paid by the underwriters by a further per centage, whether the same were settled between the plaintiffs and the ship by arbitation, *or by legal decision*.

THIS was an action against an underwriter on a policy of insurance, in which a verdict was taken for the plaintiffs at *Guildhall* for 190*l.* 1*s.* 8*d.*, subject to the opinion of this Court on the following case.

The policy was underwritten on the ship *Resolution*, Capt *Bell*, laden by the plaintiffs with a cargo of lead; and the risk by a special memorandum therein was thus declared. "In consideration of ten guineas per cent. hereby acknowledged to be received, the underwriters on "this policy agree to pay a loss in case the *Resolution*, "Capt. *Bell*, should not be allowed by the *Russian* government to unload her outward cargo at *Cronstadt* or *St.* "*Petersburgh*; the said vessel having sailed chartered by "Messrs *C.* and *R. Puller* on a voyage to *St. Petersburgh* "and back." In the charter-party to which the memorandum alludes, (and which was annexed to this case and taken as part thereof,) the plaintiffs covenanted with Captain *Bell*, "that if political or other circumstances "should arise to prevent the shipping a return cargo, or "discharging the outward cargo, they would pay "2700*l.*; with 10*l.* per cent. thereon, and 100 guineas

"as

"as a gratification to Captain *Bell*." When the ſhip arrived at *St. Peterſburgh* ſhe was not allowed by the *Ruſſian* government to unload her cargo; but Captain *Bell*, after remaining at *St. Peterſburgh* the due time, according to his charter-party, and conforming himſelf in all things thereto, took in a cargo of *Ruſſian* produce for *Thorntons* and *Bayley* in *England*, and ſtowed the ſame over the lead with which his ſhip was loaded by the plaintiffs, and brought both direct to *London*, and received from *Thorntons* and *Bayley* 2156*l.* 10*s.* 9*d.* for the freight of the cargo brought to them. The plaintiffs commenced actions in this court on the policy, to recover what was due from the defendant and the other underwriters. At the ſame time an action was commenced on the charter-party by Captain *Bell*, to recover 2700*l.*, the full amount of the dead freight, and the 10*l.* per cent. thereon, amounting to 270*l.*; and the 105*l.*, his own gratification; amounting in the whole to 3075*l.* The plaintiffs by their plea to that action claimed a deduction equal to the amount of the freight received by Captain *Bell* from *Thorntons* and *Bayley*. While the laſt-mentioned action was pending, and before it came to trial, viz. in *June* 1809, the following agreement was entered into between the attornies for the plaintiffs and defendant.

"*Puller* and Another *againſt* "The Underwriters on "the ſhip *Reſolution*.	Setlement of policy for 4500*l.*

	£.	s.	d.
"Groſs amount - -	5672	14	9
"Allowed for freight and primage "on the voyage home	2156	10	9
"If 5672*l.* 14*s.* 9*d.* loſe - -	3516	4	0

"What will 400*l.* loſe?

"Anſwer 61*l.* 19*s.* 8*d.*"

 "We

1810.

PULLER *against* HALLIDAY.

"We agree to the immediate payment by the under-
"writers of this per centage: and in case Messrs. *Puller*
"should not be able to obtain so large an allowance as
"2156*l*. 10*s*. 9*d*. in respect of the freight paid by *Thorn-*
"*tons* and *Bayley*, by reason of any demurrages or expences
"being allowed against the said freight, the difference
"shall be paid by further per centage, whether the same
"be settled between Messrs. *Puller* and the ship by arbi-
"tration, or *by legal decision*. The above sum of 61*l*.
"19*s*. 8*d*. per cent. to be paid with the taxed costs of
"the several actions." (Signed) *Blunt* and *Bowman*.

The adjustment thereupon made upon the policy, upon which this per centage of 61*l*. 19*s*. 8*d*. was paid, was as follows:

London, 1st *June* 1809.

"Paid a loss of 61*l*. 19*s*. 8*d*. per cent. on terms of
"agreement signed by Messrs. *Blunt* and *Bowman*."

61*l*. 19*s*. 8*d*. *T. Halliday*.

The above per centage of 61*l*. 19*s*. 8*d*. was accordingly paid by the defendant and the other underwriters to the plaintiffs with the taxed costs of the several actions. On the last day of *Hilary* term 1810 the Court of Common Pleas gave judgment in the cause of *Bell* v. *Puller and Another* (*a*), and thereby directed that the plaintiffs should

(*a*) BELL *against* PULLER and Another.

Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburgh*, and there immediately receive a return cargo from the freighters' agent and bring it to *London*; with a proviso that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. Petersburgh* 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London* or any port in *England*: held that such political circumstances having occurred as hindered the unloading of the outward cargo at *St. P.*, and the ship having waited the 40 running days there, the master was entitled to receive the freight of a homeward cargo, which he loaded on his own account upon the outward cargo, and brought home, in addition to the dead freight payable by the freighters according to the stipulations of the charter-party.

I have been favoured by one of the counsel in the cause with the following note of the judgment given in this case:

Sir JAMES MANSFIELD C. J. This is an action on a charter-party of a very singular kind. The demand is for 2700*l*., by a technical phrase called

should pay to Capt. *Bell* the full sum of 3075*l.*, without any allowance in respect of the freight earned by him from *Thorntons* and *Bayley*; they being of opinion that he was

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called *dead freight*. The defendants insist they are not bound to pay the whole 2700*l.*, because the plaintiff acquired some freight for goods which he procured to be put on board at *St. Petersburgh* and brought to *England*: and the question is, Whether the defendants are entitled to make any such deduction; or whether the plaintiff is entitled to recover the whole 2700*l.*? The declaration states that the plaintiff let the ship on a charter-party to go to *St. Petersburgh* from *London*. There is the usual covenant that the ship should be tight, &c.; and that she should take on board 150 tons of lead, and carry the same to *St. Petersburgh*, or as near thereto as she could get, and that she would there immediately receive on board a cargo of goods from the defendant's agents, and bring them to *London*. The ship was to lie at *St. Petersburgh* 50 running days in the whole. The plaintiff is to be paid at the rate of 11*l.* 11*s.* per ton, with 10*l.* per cent. primage, and a gratification of 100 guineas to the captain. Then it is provided that if political circumstances should occur to prevent a return cargo being put on board, the defendants were to be at liberty to detain the ship at *St. Petersburgh* 40 running days after her arrival there, and that after the ship had lain 40 running days at *St. Petersburgh*, without the cargo being unloaded, and consequently without the return cargo being loaded, the plaintiff should be at liberty to return to *London* or any port in *England*; which is the extraordinary part of the case. It happened that the *Russian* government would not suffer the cargo to be unloaded, and that, after 40 running days were expired, the plaintiff became at liberty to return to *England*, and acquired an extraordinary freight. There is no covenant to bring back the lead to *London* in case of a non-delivery at *St. Petersburgh*; though, I suppose, lead would be worth much less at an out-port than in *London*. 2700*l.* is to be paid on the ship's arrival at any port in *England*. The object of the voyage was the return cargo; and the freight upon that at 11 guineas per ton would have exceeded the dead freight. A cargo homewards not being to be obtained, the Defendants, I presume, were to have their lead; and the reason, I suppose, why the deed is so inaccurately drawn was, that it was inferred that if there was no return cargo, the lead would come back on the same terms as the return cargo. But that is inconsistent with the other clause, that on arrival at any port in *England*, the dead freight was to be paid; for, certainly there was no obligation to bring back the lead to *London*. This makes it a very extraordinary case. None of the cases cited from *Abbott* or elsewhere apply, so as to afford a rule for the present case; because it amounts to nothing more than supposing the captain bound by his covenant to bring back the lead: it is nothing more than a contract to bring back a certain quantity of goods, not

1810.

PULLER *against* HALLIDAY.

was entitled to retain for his own use the 2156*l.* 10*s.* 9*d.* received on that account, and also to be paid his full dead freight with 10*l* per cent. thereon, and 105*l.* as a gratifi-

not according to a certain freight or weight, but merely as a waggoner might agree to carry goods from *London* to *Exeter* or elsewhere. Now considering this as a mere contract to bring certain goods to *England*, I see no reason why the captain may not earn what else he can by taking goods on board for his own benefit. In common cases there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port; and if he does not, the ship owner has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you, I pay you so much: would not the owner in that case have a right to take goods on board for his own account? His ship is at full liberty to make any other profit; and in such a case he doubless would insist on more or less liquidated damages, according as he foresaw what would be his chance of getting freight at the place where he was going: he would raise or lower his demand accordingly: and I see no reason in such a case why the charterer should not pay the liquidated damages stipulated, because the ship owner had made a profit by a cargo supplied by some other person. I was at first much staggered by the case in the King's Bench (*a*), which appeared very similar to this: but there the captain did not bring home the lead, but instead thereof went to *Stockholm*, and there sold the lead, and got other goods and brought them home. The plaintiffs in that case called on the underwriters on a very singular insurance, not of ship, freight, goods, or voyage, but the underwriters had agreed to pay a total loss in case the ship was not allowed to load a cargo at *St. Petersburgh*. That was in effect an insurance of the voyage; and there the *Pullers* demanded a sum of 2500*l.*, thinking they were bound to pay that to the owner: but the Court held the underwriters were not obliged to pay the whole, but the whole, minus the freight obtained by the captain at *Stockholm*. There is a strong difference between the two cases: there the lead was the property of the *Pullers*, and was not brought back, but was sold at *Stockholm*, for any thing that appears: for the only means the captain had of obtaining any freight at *Stockholm* might arise from the use he made of the lead at *Stockholm*: and therefore the King's Bench thought that the captain, who had done all this for his own benefit, should not be entitled to that, leaving the underwriters to pay the whole 2500*l.* But in this case, on the best consideration, we think the defendants are not entitled to deduct from the 2700*l.* the profit the captain made. Something has been said, that if a full return cargo had been put on board, the captain would have got

(*a*) *Puller* v. *Staniforth*, 11 *East*, 232.

more

gratification. That sum was accordingly paid to him; and the defendant with the other underwriters having refused to pay any further per centage, this action was proceeded in for the recovery of such further per centage as will pay the plaintiffs a total loss on the sum insured, being 190*l.* 1*s.* 8*d.* or 38*l.* 4*d.* per cent. on the defendant's subscription of 500*l.* The question was, whether the plaintiffs under all the circumstances were entitled to recover this further sum? If they were, the verdict was to stand: if not, then it was agreed that the money paid under the adjustment should be considered as having put an end to the action; and that a nonsuit was to be entered.

Puller for the plaintiffs said that two questions would arise; 1st, Whether the adjustment of *June* 1809 by its terms precluded the plaintiffs from recovering the further per centage mentioned in the agreement: 2dly, Whether supposing that adjustment not conclusive, the plaintiffs were not entitled to recover from the underwriters the sum they have paid as dead freight to Captain *Bell* under the judgment of *C. B.*? At the time when the agreement was made actions were pending in this court against the underwriters to recover a total loss,; and an action was pending in *C. B.* by Captain *Bell* against the plaintiffs upon the charter-party, to recover the dead freight on the voyage to *St. Petersburgh*, without allowing the

more than he will now get by the 2700*l.* with this freight. It is said by the plaintiff, pay me what you would have paid if the whole return cargo had been put on board at *St. Petersburgh*, and I will allow the return freight out of it. I do not know how that is; it is a matter of calculation; but the plaintiff is entitled to his 2700*l.*

Rule discharged.

1810.
Petrie against Halliday.

freight earned by him on the voyage home. After the case of *Puller* v. *Staniforth* (a), upon a similar charter-party, it seemed to be of consequence that the freight earned on the voyage home would be allowed in reduction of the dead freight on the voyage out; and the agreement was entered into with a view to that expected consequence. [Lord *Ellenborough* C. J. Whether the adjudication of the Court of C. P. in the case of *Bell* v. *Puller* were right or wrong does not appear to us to signify upon the construction of the agreement between these parties, if that legal adjudication have enlarged the plaintiffs' claim to indemnity from the underwriters; we will therefore hear the other side.]

Scarlett, contrà, contended that the same question was open upon the policy on which the action was brought, as if no adjustment or agreement had taken place: the questions therefore were, 1st, What were the rights of the parties when the ajustment took place? and 2dly, What effect the adjustment had upon these rights? The judgment of C. B. in the case of *Bell* v. *Puller* is not binding as between these parties. [*Bayley* J. We must take it now that the plaintiffs were compelled under that adjudication to make the full payment for the dead freight.] That was not an event insured against; and an assured may sustain a loss by such an event, which he is not entitled to recover against the underwriters. The decision of that Court too is rather at variance with the judgment of this Court in *Puller* v. *Staniforth*. [Lord *Ellenborough* C. J. We there considered that Messrs. *Pullers* had adopted the agency of the captain, in proceeding

(a) 11 *East*, 232.

with

with the outward cargo from *St. Petersburgh* to *Stockholm*, and disposing of it there, and bringing home a return cargo from thence, on which freight was earned.] It is still open to contend that Messrs. *Pullers*, the freighters, are entitled to stand in the place of the owner all through the voyage; which is a view of the case that does not appear to have been sufficiently pressed on the Court of C. B.; for they hired the ship on the voyage to *St. Petersburgh* and back; the captain therefore was to be considered as their agent during the voyage out and home. [Lord *Ellenborough* C. J. The difficulty lies in finding any general terms of hiring in the charter-party: it rather seems to be a special hiring of the ship to carry out a certain cargo to *St. Petersburgh*, and to receive a certain other return cargo there from the freighters' agents, with liberty to the captain to return home after waiting a certain time there without the outward cargo being unloaded there and the return cargo loaded on board.] The argument for a general hiring upon the voyage out and home arises from the general view of the charter-party, which is to put the charterers in the place of the owner during the whole time the ship is out upon the voyage: the particular terms and conditions merely regulate the manner in which the voyage is to be conducted: and admitting that the captain is not bound to do more than the particular acts covenanted for; yet if he do more, it must be taken to be for the benefit of the substituted owners contracting with him. [Lord *Ellenborough* C. J. As the ship is only let for a particular purpose, we cannot extend the letting beyond the terms of the contract. If there had been a general hiring, it would have been different. Would a freighter hiring a ship for a particular voyage be liable for the act of the captain

1810.

FULLER *against* HALLIDAY.

captain going upon a voyage entirely different?] Then 2dly, the intention of the parties in coming to the agreement stated was to put an end to the action, and then the question is the same as if the plaintiff had sued upon the agreement. The underwriters defend themselves upon the ground that by the terms of that agreement they are only liable for a certain sum, which has been paid to the plaintiffs: and they only agree to pay a certain further per centage in case the plaintiffs should not be able to obtain so large an allowance as 2156*l.* 10*s.* 9*d.* in respect of the homeward freight *by reason of any demurrages or expences* being allowed against the said freight. That was a good consideration for putting an end to the action; and if this action had been brought upon the agreement, as in effect it must be considered to be, the plaintiffs must have declared, that in consideration that they would put an end to the action on the policy, and would receive 61*l.* 19*s.* 8*d.* the defendant promised to pay that sum and such further sum as should be allowed for demurrage or expences allowed against the freight paid by *Thorntons* and *Bayley*. And the contract having been made with full knowledge of the facts, but upon a misapprehension of the law, the parties would still be bound by it, according to *Bilbie* v. *Lumley* (*a*).

Lord ELLENBOROUGH C. J. Both parties expected that a certain sum would have been allowed to the plaintiffs for the freight earned on the voyage homewards, but they contemplated that certain allowances for demurrage and other expences might be set off against that freight; and they agreed that if any thing were deducted on these accounts, the plaintiffs' loss should be balanced by a fur-

(*a*) 2 *East*, 469. and vide *Stevens* v. *Lynch*, 12 *East*, 38.

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ther payment by the underwriters. It turns out that both parties were in this respect deceived: then are they not both remitted to their original rights? It appears that the assured were originally entitled to recover from the underwriters a total loss; and it was contemplated at one period that the assured were to receive 2156*l.* 10*s.* 9*d.* minus certain allowances, as a probable diminution of that loss: they thereupon entered into the agreement stated, whereby in proportion as the allowances for demurrage and other expences might lessen the sum of 2156*l.* 10*s.* 9*d.* expected to be received by them, the underwriters agreed to pay them a further per centage, beyond the sum of 61*l.* 19*s.* 8*d.* per cent. which they were presently to receive. But it turns out that instead of their loss amounting only to 61*l.* 19*s.* 8*d.* per cent., it is now increased to a much higher amount, in consequence of the adjudication of the Court of *C. B.* in the action against them by Captain *Bell*, in which they were found not to be entitled to receive any part of the 2156*l.* 10*s.* 9*d.* for the home freight. The loss of the plaintiffs therefore upon the policy is now enhanced by the whole amount of that sum, and therefore they are entitled to recover it from the underwriters. By the charter-party there was nothing which gave to the plaintiffs the dominion of the ship for the whole voyage out and home, but she was let to them for special purposes only. If there had been a general hiring, they might have been entitled to the home freight. In the former case of *Puller* v. *Staniforth* we considered that the acts of the captain, in carrying the outward cargo to *Stockholm* and disposing of it there, and earning a freight homewards, were done by him for the benefit of the plaintiffs, the freighters, and were adopted by them; and it was not suggested to us that their adop-

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1810.
PULLER *against* HALLIDAY.

tion of the master's acts was disputed; and then the consequence we drew from such adoption followed of course: but in the case decided in the Court of C. P., a question was raised, whether the *Pullers* were entitled to any freight earned by the ship beyond the particular purposes for which she was chartered by them: and it has been decided that they were not. Here then the plaintiffs have in the event sustained a total loss, and are therefore entitled to recover the whole from the underwriters upon this policy.

Grose J. declared himself of the same opinion.

Le Blanc J. The first question arises upon the interest of the plaintiffs; it is not an insurance on freight to be earned generally by the ship, but upon the particular adventure for which she was chartered. It was a particular and special interest in the freight under the terms of the charter-party, and not a general interest in any freight which should be earned by the ship. And this differs it from the former case of *Puller* v. *Staniforth* before this Court, where the captain had not refused to take in a homeward cargo on account of the freighters, when he found he could not unload the outward cargo at *St. Petersburgh*, but had proceeded with the outward cargo to another part, and there disposed of it, and taken in another cargo in lieu of it, which he brought home. The Court there considered him as having acted for the best in pursuance of the original adventure under the circumstances which had occurred, and that his acts were recognized by the *Pullers*. But here the master, not having been allowed to unload the outward cargo, and having remained for the stipulated time at *St. Petersburgh*, took in a homeward cargo which was stowed upon the

other, and brought it home, upon his own account and risk: and in an action brought by him in the Court of *C. P.* against the present plaintiffs, that Court held that he was entitled to the freight which the ship had earned on the homeward cargo. Then while that action was depending, these parties came to an adjustment and agreement in the terms stated: and that brings it to the question upon the terms of that agreement; which did not put an end to the action upon the policy, but went upon the grounds that there was a clear payment of 61*l.* 19*s.* 8*d.* per cent. due to the plaintiffs, and that the underwriters would make good the remainder if that sum should fall short of what the plaintiffs were entitled to recover from them after the judgment of the Court of *C. P.* in the action against them by the master should be known. Then that question having been decided against the present plaintiffs, their loss upon the policy is enhanced by so much the more, and there is nothing in the terms of the agreement between these parties that stands in the way of their recovering the amount of such further loss.

BAYLEY J. The object of the insurance in question was to reimburse the plaintiffs all the loss which they should sustain, in case Captain *Bell* should not be allowed by the *Russian* government to unload the outward cargo; and upon the action brought against them by the master it turns out in the event that they have been compelled by the judgment of the Court of *C. P.* to pay the master the whole amount of the dead freight, and the other sums stipulated for by the charter-party, amounting altogether to 3075*l.*, and that they are not entitled to any allowance for the freight earned on the homeward cargo. And I cannot say that the plaintiffs, who have had money recovered

1810.

PULLER *against* HALLIDAY

recovered against them by the judgment of a court of law, except in a case of fraud, have paid it wrongfully. If there were any doubt as to the propriety of that judgment, I should still conceive that the plaintiffs, who have been thus compelled to pay it, would be entitled to recover it from the underwriters under this agreement: but I think that the judgment of the Court of *C. P.* is right. In the case of *Puller* v. *Staniforth* it does not appear but that the very circumstance of the captain's disposing of the outward cargo at *Stockholm* enabled him to bring home the other cargo from thence. Though if upon consideration it had appeared to me that our opinion had been wrong, I should have had no difficulty in saying so. Here, however, the captain, after having waited at *St. Petersburgh* the stipulated time, without being permitted to unload his outward cargo, might think, that while he performed his contract with the freighters faithfully, by bringing home the outward cargo upon dead freight, there was no reason why he should not make any additional profit upon the homeward voyage consistently with his engagement with the freighters: and the plaintiffs having been compelled to pay him the whole of the dead freight under the judgment of the Court of *C. P.*, I think they are entitled to recover it from the underwriters.

Postea to the plaintiffs.

SHEE *against* CLARKSON and Others.

Friday, June 29th.

THE plaintiff, an underwriter, brought assumpsit against the defendants, policy brokers, to recover a balance of 541*l.* 10*s.* 0*d.* due to him for premiums of insurance on divers policies subscribed by him. The defendants pleaded the general issue, gave notice of set off, and paid into Court 335*l.* 10*s.* 6*d.*; and at the trial in *London* before Lord *Ellenborough* C. J. a verdict was taken for the plaintiff for 205*l.* 19*s.* 6*d.*, subject to the opinion of the Court on the following case.

The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter.

The plaintiff in 1808 had subscribed policies of insurance which the defendants had effected as brokers, the premiums upon which amounted to 559*l.* 10*s.* 0*d.*, and had also settled and signed upon policies subscribed by him for them adjustments for returns of premiums amounting to 18*l.*, leaving a balance due to the plaintiff of 541*l.* 10*s.* 0*d.*; for which this action was brought. The defendants insist that they are entitled to deduct or retain out of that sum, the sum of 205*l.* 19*s.* 6*d.*, being the amount of deductions for short interests and stipulated returns of premiums for convoy upon the *same* policies, for the premiums on which this action was brought, and which policies had always remained in the defendants' hands, and had not been handed over to their principals. There was no evidence that the defendants had received the premiums from their principals, nor was there any evidence that the defendants had credited their principals with returns of premium for convoy and short interest claimed by them. The plaintiff has allowed the defendants in account all the returns on policies upon

1810.

SHEE *against* CLARKSON.

ſhips and goods in which they were perſonally intereſted, and alſo all the returns on policies which have been adjuſted; and the ſet off or deduction claimed of 205*l.* 19*s.* 6*d.* in diſpute ariſes upon policies ſubſcribed by the plaintiff, which the defendants have effected as brokers for others. The defendants did not act under any del credere agency or commiſſion. The events entitling to the returns claimed had happened before the commencement of the preſent action; but it was not admitted by the plaintiff that the defendants were thereby entitled to deduct or ſet off the returns claimed, that being the queſtion for the opinion of the Court. The plaintiff inſiſted that, upon the events happening, *the principals*, and *not the brokers*, were entitled to the returns claimed, unleſs ſuch returns were adjuſted by the underwriters with the brokers: and the defendants inſiſted that, upon the events happening, without any adjuſtment, or del credere commiſſion, they as brokers were entitled to the returns, as abatements out of the premiums. The queſtion was whether the defendants were entitled to deduct or ſet off the ſum of 205*l.* 19*s.* 6*d.*? If not; the verdict was to to ſtand for that amount: if they were ſo entitled, a verdict was to be entered for the defendants.

Richardſon for the plaintiff inſiſted that the defendants were not entitled to deduct the ſum in diſpute. The aſſured and the underwriters are the real contracting parties, who contract through the medium of the broker. The premium is payable by the aſſured inſtanter, immediately before the policy is ſigned, as it is expreſſed to be in the policy itſelf; though in practice the money does not paſs immediately, but an account is carried on through the broker; who, however, as between

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the assured and underwriter, is considered as having received the premium at the time when the policy is executed for the benefit of the underwriter; and the underwriter, who admits by the policy that he had received it, could not maintain an action for it against the assured. [*The Court* here interposed, and suggested that the case might be more perfectly stated by finding the fact, upon which the merits of the case turned, whether or not the broker continued an agent of the assured for the purpose of adjusting and receiving returns of premium: and after some hesitation that fact was admitted.] But he contended that the broker could not adjust returns of premium for the assured, without the consent of the underwriter, so as to bind him against his consent. [Lord *Ellenborough* C. J. No doubt the underwriter may at any time determine the agency of the broker, as far as regards himself: and if the underwriter had put an end to the broker's agency for him after the premiums credited to him, and before the events happened on which the returns of premium were to be made, there might be some question; but while the agency on both sides subsists in the usual manner, and after the events have happened which entitle the assured to the returns, how can the underwriter recover the premiums against the broker, without allowing the returns?] There is no difference in principle between the agency of the broker for settling *losses*, and his agency for adjusting and receiving *returns of premiums*; and in *Wilson and Others*, assigns of *Fletcher*, v. *Creighton and Another* (*a*), it was held that the defendants, factors, had no right to set off *losses* on policies underwritten by the bankrupt for their correspondents, though happening before the bankruptcy,

(*a*) *Trin.* 22 *G.* 3. *B. R.* cited in *Grove and Another*, *assignees of Fletcher*, v. *Dubois*, 1 *Term Rep.* 113. and in 1 *Marshall on Ins.* 204.

against

1810.

Shee against Clarkson.

against an action for premiums debited to the defendants by the bankrupt upon insurances on behalf of those correspondents; the assured themselves only being entitled to sue for such losses. And *Grove* v. *Dubois*, where the broker was held entitled to set off under the general issue such losses, turned expressly upon the fact of his having a commission *del credere* from his principal, the assured; which fact is negatived in this case. [Lord *Ellenborough* C. J. The amount of the premiums, depending often upon contingencies, are to be liquidated in the events; and till those events are determined the broker is the mutual agent for the one to pay, and for the other to receive: and if the agency be not put an end to by either party before the event, that ascertains what the true amount of the premium is for which the underwriter ought to have been credited. There is no question between these parties about *losses*. *Bayley* J. Suppose it turned out, after a policy made as interest should appear on goods expected to be shipped, that there was no interest; could the underwriter, after that was known, recover the premium from the broker, leaving it to be sued for and recovered back by the assured?] If there were no fraud, it should seem that such an action would lie by the underwriter against the broker. [Ld. *Ellenborough* C.J. Suppose a case where no broker intervened, and the underwriter, after the event, sued the assured for the full premium, he could only recover, subject to the deduction for return of premium.] That would be a different kind of dealing; for as between those parties it is always understood to be a ready money dealing: the underwriter admits by the policy, that he has received the money from the assured. But that is not the case with the broker; and though he may be the agent of the assured for the

1810.

SHEE against CLARKSON.

purpose of paying the premiums, and making adjuſtments for and receiving returns of premiums; yet he is not the agent of the underwriter for the purpoſe of making ſuch adjuſtments; for the underwriter always makes his own adjuſtments with the broker. The premium is money which the broker has received for the uſe of the underwriter, and it can be no anſwer for the broker in a court of law, that the underwriter owes his principal another ſum. A debt muſt always be proved and averred in the name of the principal, and not of the agent; and it is only in the caſe of the principal reſiding abroad that a remedy is provided by the ſtat. 49 *G.* 3. *c.* 121. *ſ.* 16., which enables the agent to prove the loſs: but this is an attempt to do the ſame thing in effect for a principal at home.

Marryat, contrà, after obſerving that the diſtinction between the caſe of loſs, and that of a return of premium, was that in the caſe of a loſs the claim originated to the aſſured himſelf and not to the broker, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. That makes all the difference. The whole premiums ſued for might have been ſtopped by the underwriter in the hands of the broker, and while the events on which the returns of premium depended were yet undecided, his agency on the part of the underwriter might have been determined, and he might have been ordered to pay over the money. But the broker is the common agent of both the aſſured and the underwriter; and the underwriter knows that the broker is the truſtee for the aſſured as long as the policy remains in his hands, to adjuſt and receive returns of pre-

1810.

SHEE against CLARKSON.

mium for him when the events have happened on which they are to be made. Here then the brokers, having notice that the events had happened which entitled the assured to such returns before they had paid over the entire premiums to the underwriter, were entitled to deduct so much from the gross amount of those premiums.

GROSE J. was of the same opinion.

LE BLANC J. The difference lies between that which is due to the assured for losses, and what is due for returns of premium. Suppose a premium of 10 guineas per cent. is to be reduced to 5, if the ship sail with convoy; and before the money is paid over to the underwriter the event is known to have happened which reduces the premium to 5 guineas; what is the sum which the underwriter is entitled to receive? Clearly no more than 5. Then he can recover no more from the broker who is the common agent of the two.

BAYLEY J. The underwriter suffers the full premium to remain in the hands of the broker, who is the agent also of the assured; and in the mean time the event happens which reduces the underwriter's claim in respect of the premium to a less sum than it was at first: it is then the justice of the case, and the law of the case also, that the broker should pay over to him only so much as remains due at the time. The broker is the agent for the assured, who has a right to give him notice not to pay over to the underwriter more than is then due.

Postea to the defendants.

GRIFFITH *against* YOUNG.

Monday, July 2d.

A tenant having agreed with his landlady that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent, he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will, if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognisant of this agreement; is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land.

THE defendant occupied a house as tenant to the plaintiff under lease, and being desirous of assigning over the premises to one *Pugh*, which he could not do without the leave of the plaintiff, he applied to her for that purpose; and it was finally agreed between the parties that in consideration that the plaintiff would accept *Pugh* as her tenant at a certain rent, he should pay 100*l.* for the good will, out of which the defendant was to pay the plaintiff 40*l.* for her consent. *Pugh*, who was cognisant of this agreement, afterwards paid the 100*l.* to the defendant, who then promised that Mrs. *Griffith* should have her 40*l.*, and that she might send for it and receive it: but when applied to afterwards on her behalf, the defendant refused to pay it over; and said that there was no written agreement, and that words were but wind. At the trial before Ld. *Ellenborough* C. J. at *Westminster*, the plaintiff, having failed upon a special count in assumpsit upon the agreement, resorted to the general count for money had and received; but was nonsuited upon an objection taken, that this was an agreement for an interest in land, and therefore ought to have been in writing by the 4th section of the statute of frauds (*a*).

Garrow and *Comyn* in moving to set aside the nonsuit on a former day in this term, contended that money paid for *good will* was not for an interest in land, but collateral to it: but that at any rate if one agree to receive money for the use of another, which the defendant must be taken to have done in this case, (and *Pugh* who paid

(*a*) 29 *Car.* 2. *c.* 3.

1810.

GRIFFITH *against* YOUNG.

the money and was cognisant of the agreement said at the trial that he would not have paid the 100*l.* to the defendant if the latter had not promised to pay the 40*l.* to Mrs. *Griffith*;) it matters not on what account it is received, but it is recoverable as money had and received for the use of that person.

Park now shewed cause against the rule for setting aside the nonsuit; and, admitting that the 40*l.* was received by the defendant to the plaintiff's use, insisted that it was still received on account of an interest in the land, which was to be made over by the plaintiff to *Pugh*, the payer. The consideration was the plaintiff's accepting *Pugh* as her tenant, which is giving him an interest in the land, under whatever name it may be called: and he referred to a case of *Smith* v. —— before *Rooke* J. on the northern circuit, where an agreement to let in an under-tenant for a certain sum which was to be paid was held to be within the statute. [Ld. *Ellenborough* C. J. I have no doubt that it would be within the statute if the contract were executory, but when the contract is executed, and money has been actually paid by the succeeding tenant to the defendant in trust to be paid over by him to the plaintiff, shall he now gainsay that he received it for her use. *Le Blanc* J. The consideration is past: *Pugh* is in possession, and has paid this money to the defendant for the very purpose of his paying it over to the plaintiff: it is clearly therefore money received for her use.] Not so, where the consideration is illegal and void by the statute.

Lord ELLENBOROUGH C. J. If one agree to receive money for the use of another upon consideration exe-

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cuted, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other. I was misled at the trial by having my attention called to the statute of frauds, when in truth the question was wholly collateral to it.

1810.

GRIFFITH *against* YOUNG.

LE BLANC J. It would have been a different question if *Pugh* had not paid the money to the defendant, and the action had been brought against him.

GROSE and BAYLEY, Justices, according;

Rule absolute.

DOE, on the Demise of SAM. COTTON, *against* STENLAKE.

Tuesday, July 3d.

Under a devise to one and *her heirs* (she having two children before, and a third born after, making the will) *during their lives*; held that these latter words were repugnant to the others, and that she took an estate of inheritance.

THIS was an ejectment for land called *Moorhead Meadow*, in *Devonshire*, which was brought on two demises of *Samuel Cotton*; one laid on the 18th of *May* 1807, the other on the 29th of *September* 1809. At the trial at *Exeter* before *Chambre* J. a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

Edward Bowden was seised in fee of the premises in question, and had a son *Edward*, and a daughter *Phillis*, who in 1765 was married to *James Cotton*, and had by him three children, *Samuel* the lessor of the plaintiff, and two daughters. *Samuel* and *Edicle*, the eldest daughter, were born before the making of the will after mentioned,

1810.

Doe, Lessee of Cotton, against Stenlake.

and one daughter was born after. *Bowden*, the elder, by his will dated 27th of *February* 1773, duly executed and attested, devised (inter alia) as follows:—"Also I give "unto my daughter *Phillis Cotton and her heirs* Moor-"head Meadow *during their lives*:" and on the 17th of *October* died seised of the premises; leaving *Phillis Cotton* and his son *Edward Bowden* surviving him. *James Cotton* in right of his wife immediately entered on *Moorhead Meadow* and occupied it; and after the death of *Phillis* on the 31st of *October* 1784 still continued to occupy it, without interruption, till 1789, when it was claimed by *Edward Bowden*, the son of the testator; to whom, after ejectments were delivered and some law proceedings had, *James Cotton* gave up the possession on the 12th of *February* 1790. *James Cotton* died on the 17th of *May* 1807, leaving *Samuel*, the lessor of the plaintiff, his eldest son and heir at law, and heir at law to *Phillis Cotton*. The defendant is in possession under the devisees of *Edward Bowden* the younger. If the plaintiff were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Dampier for the plaintiff having stated the question to be what estate *Phillis Cotton* took under the devise to her *and her heirs, during their lives*; Lord *Ellenborough* C. J. asked the defendant's counsel, what objection there could be to rejecting the latter words, *during their lives*, which were repugnant to the devise to the daughter *and her heirs*?

Burrough answered that *Phillis Cotton*, at the time when the will was made, had two children living; and that if by the word *heirs* the testator meant *children*, which seemed probable, the whole would be reconciled, and the mother and her two elder children would then

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take joint estates for their lives. [*Grose* J. observed that according to that construction the youngest daughter born after the making of the will, though before the testator's death, would take nothing.] *Burrough* said that he must so contend; but that the difficulty of doing so was less than that of rejecting words sensible in themselves, and not repugnant to the devise to *her heirs* in the sense he used them, as synonimous to *children*. In *Doe* v. *Laming* (*a*) it was considered not to be of absolute necessity that the word *heirs* must be a word of limitation; but that it might be used as a word of purchase.

Lord ELLENBOROUGH C. J. As the defendant's interpretation of the will would exclude the after-born child from taking, that alone is a sufficient reason against it. If the word *heirs* is to be understood either as *heirs generally* or as *heirs of the body*, the lessor of the plaintiff is entitled: and he is not barred from maintaining this ejectment by lapse of time; for his father's possession was not adverse to him; and that continued down to the 12th of *February* 1790; and this ejectment must have been commenced before the expiration of 20 years from thence. The words *during their lives*, after the devise to the daughter and *her heirs*, is merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives.

Per Curiam, Postea to the Plaintiff.

(*a*) 2 *Burr.* 1100.

1810.

Tuesday, July 3d.

Blackett and Another *against* Smith, Treasurer of the *West India* Dock Company.

The owner of a homeward-bound ship entering the *West India* Docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be quayed and unloaded in rotation in the import dock, in the manner required by the 39 *G.* 3. *c.* 69. is bound to bear the extra expences of labourers for pumping the ship after the crew were discharged, and for delivering the cargo into lighters in the outward dock or basin; also for coopering previous to such delivery into lighters, and for the hire of such lighters, the company having afterwards unladen the cargo out of such lighters upon the quays in the import dock, and performed the requisite cooperage, &c. upon such unlading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in its proper time and place.

THE plaintiffs declared in assumpsit, and stated that they were possessed of a ship lately arrived in the river *Thames* from the *West Indies*, with a cargo of *West India* produce; and in consideration that they had caused her to enter the docks of the *West India* Dock Company, erected pursuant to the stat. 39 *Geo.* 3. *c.* 69., of the completion whereof due notice had been given, and also in consideration that the plaintiffs would pay to the company the rate or duty of 6*s.* 8*d.* per ton of the ship's burthen pursuant to the statute, the company promised that they would use due care and diligence about, and bear all charges of, the navigating, mooring, unmooring, removing, and management of the ship, from her arrival into the entrance of the docks at *Blackwall*, until she should be unloaded and moored in a certain dock of the company appropriated to light ships, and also in and about and of the unloading of her cargo within the docks, and the landing waiters' fees on account thereof, and also in and about and of the cooperage and hoops and nails, which the cargo might require in the course of such unloading thereof. That the plaintiffs paid the duty of 6*s.* 8*d.* per ton, amounting to 101*l.* 7*s.* 1*d.* That *when the ship entered the docks she was leaky, and it was necessary for the preservation of the cargo that it should be unloaded, and the pumps kept at work;* whereof the company had notice. Yet the company refused to unload the cargo, or to cause

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1810.

BLACKETT *against* SMITH.

the pumps to be worked; by reaſon whereof the water flowed into the ſhip; and the plaintiffs for the preſervation of the cargo were put to the expence of 169*l.* 0*s.* 6*d.* *in pumping the ſhip* and *unloading the cargo*, and *in coopering and providing hoops and nails in the courſe of ſuch unloading thereof*. There was a ſecond count for not *lightning* the ſhip; and the 3d and 4th were founded on promiſes to bear all the charges of the navigating, &c.; omitting the uſing due care and diligence. There were alſo the common money-counts. The defendant pleaded non aſſumpſit: and at the trial of the cauſe before Lord *Ellenborough* C. J. in *Middleſex*, a verdict was found for the plaintiff for 169*l.* 0*s.* 6*d.*, ſubject to the opinion of this Court upon the following caſe.

Previous to *July* 1809 the *Weſt India* Docks were completed in purſuance of the acts 39 *Geo.* 3. *c.*69., and 42 *G.* 3. *c.* 113., and notice thereof was given as required by the latter of thoſe acts. The defendant is the treaſurer of the company. The ſhip, the *City of Edinburgh*, of which the plaintiffs are owners, arrived off *Blackwall* in the river *Thames* from the *Weſt Indies*, with a cargo of *Weſt India* produce on board, on the 18th of *June* 1809, and having applied to be admitted into the *Weſt India* Docks, the printed regulations of *June* 1809 ſigned by the ſecretary of the Dock Company were delivered to the captain. (A copy of theſe printed regulations formed a part of the caſe, but nothing particular turned on them.) The ſhip entered the baſin at the *Blackwall* end of the *Weſt India* Docks on the 19th of *July* 1809, with her captain, officers, and crew on board, and they were at liberty to remain on board ſo long as ſhe remained either in the baſin or in the outward dock. The whole of the cargo was duly entered at the cuſtom-houſe and the certificate

1810.

BLACKETT *against* SMITH.

certificate thereof received at the dock offices on the 2d of *August* 1809, previous to which time no part of her cargo could be landed. The ship was so leaky when she entered the basin that it was necessary for the preservation of the cargo to keep the pumps at work, and for that purpose either to retain the crew on board, or to hire labourers to work the pumps. The quays and wharfs in the import dock are those assigned by the directors of the company for the discharging and landing of goods; and which import dock is inclosed within walls, as required by the act. The captain declined signing the printed declaration required by the company from the captains of ships to be unloaded in the import dock; which is in this form, and directed to the proper officer:

Sir, 18

The ship whereof I am master is sufficiently tight, *so as not to require pumping during the hours of intermission from business, viz., between* 4 *o'clock on* Saturday *afternoon and* 8 *o'clock on* Monday *morning.* I request you to give an order to the dock master, *Blackwall* end, to take the ship into the import dock; holding myself responsible to the *West India* Dock Company for any injury that may arise therefrom."

After the entrance of the ship into the basin at *Blackwall*, notice was given to the company that she was leaky. And she was in fact so leaky both previous and subsequent to her entering the basin, as to render it necessary to keep the pumps at work for the preservation of the cargo; and on that account it became requisite to unload the cargo into lighters, to be sent into the import dock, and there landed on the quays appropriated to the unloading of such goods. From the number of ships pass-

1810.

BLACKETT *against* SMITH.

ing through the basin into the import dock after the ship entered the basin, it became inconvenient and unsafe for her to remain in the basin, and she was therefore on the 31st of *July* removed into the outward dock by the directions of the company's officers, where her officers and crew were at liberty to remain on board her the same as in the basin, and where her cargo could with more safety and convenience, and with equal dispatch, be unloaded into lighters. On the 27th of *July* 1809 the Plaintiffs sent the following letter to the Company: "Gentlemen. *London*, 27th *July* 1809.—As owners of the ship the *City of Edinboro'*, we beg leave to request you will order your dock officers to furnish to-morrow morning lighters and proper assistants to discharge her cargo, which is now in the basin of the company's docks at *Blackwall*, or so much as may be considered necessary; but in case your officers continue to decline, or refuse or neglect to provide such craft or assistance after this notice, we shall hire them ourselves, and charge the expence attending the same to the company, as we conceive they are obliged under the 137th section of 39 *Geo.* 3. *c.* 69., to unload and discharge the cargo of this ship, in consideration of the duty of 6*s.* 8*d.* per ton, which is imposed upon her burthen by that section of the statute." Signed, &c. The dock company refused to comply with the request contained in the above letter. The plaintiffs on the 29th of *July* hired lighters to unload the cargo, and the whole of it was unloaded into lighters, and sent into the import dock, and there unloaded by the dock company upon the proper quays, after the entry of the cargo at the custom-house. On the 5th of *August* it was the turn of this ship to be quayed in rotation, but the dock company began to unload the lighters containing the

1810.

BLACKETT *against* SMITH.

the cargo on the 4th of *August*, and the cargo was completely unloaded on the 12th. The expences of unloading the cargo into lighters were paid by the plaintiffs, as follows:

	£.	s.	d.
J. M. for coopering - - -	21	5	6
J. S. for delivering the cargo, the crew having been discharged - - -	26	10	0
J. D. for lighterage - - -	51	5	0
	99	0	6

In addition to the above expences, the plaintiffs paid for the hire of labourers to pump the ship, after she entered the basin, and before the completion of her unloading, 70*l.* Previous to her entering the basin the pumps had been worked by the crew; but after their departure, viz. on the 19th of *July* 1809, it became necessary to employ labourers to perform that service. Of each of the said sums of 99*l.* 0*s.* 6*d.* and 70*l.* a part was incurred before the time when the ship's turn to be quayed in rotation arrived, the amount of which, if material, it was agreed should be settled out of court. The whole cargo was landed by the servants of the dock company from the lighters upon the same quay, and placed in the same warehouses, as it would have been if the ship had discharged her cargo alongside the quay in the usual course. The cooperage required to be performed to the cargo upon the landing thereof from the lighters, and upon the same being deposited in the company's warehouses, was performed by the company. The duty of 6*s.* 8*d.* per ton upon the burthen of the ship, imposed by stat. 39 *G.* 3. *c.* 69. *f.* 157. was duly paid by the plaintiffs on the 5th of *September* 1809, and amounted to 101*l.* 7*s.* 1*d.*

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The plaintiffs gave due notice of the action. The question was, Whether the Plaintiffs were entitled to recover the sums of 99*l.* 0*s.* 6*d.* and 70*l.*, or either of them, or any part thereof? If they were, then the verdict was to stand for such sum as the Court should direct: if they were not entitled to recover any part of their demand, then a verdict was to be entered for the Defendant.

Harrison for the plaintiffs, when this case was called on, was asked by Lord *Ellenborough* C. J., whether he meant to contend that a ship coming into the docks in the leaky condition of this ship, so as to require all these extraordinary precautions, was to be nursed and comforted by the dock company, as if the docks were to be considered as a hospital for infirm ships? To which he answered, that if she had not been compelled to go into the *West India* Docks, she might have gone to other places in the river where she could have procured the assistance she was in want of, without paying the dock rates. If it had not been considered that the company were at all events bound to bear all the charges of unloading her, application might in the first instance have been made to three commissioners of the customs (*a*), for licence to permit the cargo to be landed at some other legal quay. But whatever the inconvenience or extra expence to the company may be from the unloading of ships which arrive in a leaky condition, it is an inconvenience and an expence which arise from the monopoly of the company, and they are bound therefore to provide the means of obviating or bearing it; and till lately, they have done so. In consideration of the rate of 6*s.* 8*d.*, the

(*a*) Vide stat. 39 G. 3. c. 69. s. 83.

1810.

BLACKETT *against* SMITH.

the company engage to pay (*a*) "all charges and expences "of the *navigating*, *mooring*, *unmooring*, *removing and* "*management* of the ship, from her arrival at the en- "trance into the docks at *Blackwall*, *until such ship shall* "*be unloaded and moored* in the dock for light ships, and "also of the *unloading or unshipping of her cargo* within "the said docks, &c. and the *cooperage*, *hoops*, *and nails* "which such cargo may require in the course of such "unlading thereof," &c. [Lord *Ellenborough* C. J. Is it not an implied condition that the ship shall be in a navigable, moorable, and removeable condition when she comes into the docks: otherwise the extent of loss may be incalculable which the company might incur in providing extraordinary means of performing those services for ships which were in such a crazy state as not to be capable of being navigated, moored, removed, and unloaded in the ordinary course.] The condition of the ship may be such as to require these services to be performed immediately on her entrance into the docks, without any default of the merchant or owner; and great loss may be incurred if she be obliged to wait for a certain turn before the company are bound to unload her. [It was observed by the counsel for the company, that the necessity of ships being unloaded in rotation (*b*), and of their being unloaded upon the quays in the import dock (*c*), was imposed by the acts of parliament; which for purposes of revenue as well as for the general protection of the whole mass of property landed within the docks, required the exclusion of all persons except during the appointed hours of business, when the revenue officers were to give their attendance.]

(*a*) Sect. 137. (*b*) Vide 42 G. 3. c. 113. f. 17.
(*c*) Vide 42 G. 3. c. 113. f. 3, 4, 5, 7, 8, 9, 10, 11.

Lord

1810.

BLACKETT against SMITH.

Lord ELLENBOROUGH C. J. The law requires ships of this description to go into the docks: and if they be in such state when they arrive there, that they cannot wait for their proper turn to unload, they must discharge their cargo at once; and if any inconvenience or loss ensue to the owners from not being able to do this in the manner prescribed by the acts, it must be attributed partly to the regulations of the acts and partly to the leaky condition of the ship itself. It is a grievance, however, which the acts throw upon the owners, and not upon the company. It must not be forgotten, however, that there are some inconveniencies on the other side to be guarded against; for if a ship just able to swim into the docks were to be provided for immediately by the company with all the accommodation and convenience which her situation might require, the company would not carry on a very gainful trade. The legislature, however, have provided a remedy for extreme cases by giving power to three commissioners of the customs to enable ships arriving with cargoes of *West India* produce to unload elsewhere than in the docks. If a proper case be laid before those commissioners, they will alleviate the hardship as far as they can; but that alleviation does not enable the company to break in upon the rotation required by the act in the unloading of ships within the docks. The inconvenience therefore which may in some instances happen from these regulations must rest on the party upon whom it is thrown by the legislature. This is one of the fairest cases of defence for the company which has come before us upon the construction of these acts. The rate of 6*s*. 8*d*. per ton for ships, required to be paid to the company for the charges and expences of navigating, mooring, unmooring, removing, and management of such ships in

1810.

BLACKETT *against* SMITH.

in the docks, and for the unloading their cargoes, &c. muſt be intended of the ordinary charges and expences of navigating, &c., for ſuch ſhips as are in a reaſonably navigable, moorable, unmoorable, removeable, and manageable condition, and capable of complying with the requiſitions of the acts; and it never could have been intended by the legiſlature that the company ſhould be obliged, in conſideration of that rate, to take upon themſelves all the extra expences which ſhips in the ſtate of infirmity in which this ſhip preſented itſelf to them might require to enable her to diſcharge her cargo.

GROSE J. The conſtruction contended for by the plaintiffs would be productive of much more inconvenience on the one ſide than it would obviate on the other. According to this, the company might in a variety of inſtances be called upon to pay more for the accommodation which they rendered than they were entitled to receive under the act of parliament. It would beſides open a door to very great frauds.

LE BLANC J. That which has occurred in the preſent caſe is a poſſible inconvenience ariſing out of this eſtabliſhment, which every body muſt ſubmit to for the general benefit of the whole trade, which has been advanced by it.

BAYLEY J. concurred.

Poſtea to the Defendant.

Eaſt was to have argued for the defendant.

1810.

Tuesday, July 3d.

ALLNUTT and Another *against* INGLIS, Treasurer of the *London* Dock Company.

Where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. Therefore where the *London* Dock Company, having built warehouses in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the general warehousing act of the 43 *G.* 3. *c.* 132. whereby it became lawful for the importers to lodge and secure the wines there, without paying the duties for them in the first instance; and it did not appear that there was any other place in the port of *London* where the importers had a right to bond their wines (though if the exclusive privilege had been extended to a few others, it does not appear that it would have varied the case;) held that such a monopoly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a reasonable hire and reward: but whether, having accepted such certificate, they could afterwards repudiate it at pleasure, *Qu.*

THE declaration stated, that after the passing of the stat. 39 & 40 *Geo.* 3. *c.* 47. (the *London* dock act,) and the stat. 43 *Geo.* 3. *c.* 132. (the general warehousing act,) and the stat. 44 *Geo.* 3. *c.* 100. (the act for warehousing in the *London* dock warehouses,) and after the docks, quays, and wharfs made by the *London* dock company, according to the first act, were fit for the reception of ships and landing of goods, and after 15 warehouses were erected by the company upon their premises, and in the judgment of the commissioners of the treasury the same warehouses were fit for the reception of goods described in the act, and the same goods might safely be deposited and remain there under the regulations and directions of the act, and after three of those commissioners, *by the permission and with the consent of the company*, had certified their approbation of such warehouses, and such certificate had been duly published as required by the act, the plaintiffs imported into the port of *London* 40 pipes of wine, being goods enumerated in table B of the act, and which might lawfully be secured in the said warehouses so certified, without the duties due being first paid on importation, according to the provisions of the act, with intent and for the purpose of securing the

1810.

ALLNUTT against INGLIS.

fame in thofe warehoufes, and thereby taking the benefit of thofe ftatutes; and with the fame intent and purpofe caufed the fame goods to be duly entered with the proper officer of the cuftoms, and to be regularly landed, and duly entered with the proper collector of excife, &c. and did all things neceffary and required to legalize the lodging of the faid goods fo imported by the plaintiffs in the faid warehoufes fo certified: of all which premifes the company had notice, and were required by the plaintiffs to receive the faid goods into their faid warehoufes, and to permit the fame to be there lodged and fecured, without the duties due on importation being firft paid, according to the ftatutes, &c. *for reafonable hire and reward* in that behalf to be paid by the plaintiffs to the company, and then and at all times were ready and willing to pay the company fuch reafonable hire and reward, and tendered the goods to the company for the purpofe aforefaid. And then the plaintiffs averred, that at the time of fuch importation and tender of the goods, and when the company were fo required as aforefaid, there was fufficient room vacant in the faid warehoufes to have conveniently and lawfully lodged and fecured the fame goods, if the company had been minded to have received the fame; *whereby it became and was the duty of the company* to admit and receive the faid goods into the faid warehoufes, and to permit the fame to be there lodged and fecured as aforefaid. Yet the company, not regarding their duty in this behalf, did not when fo required or at any time admit or receive the faid goods into the faid warehoufes, or into any warehoufes, or permit them to be there lodged or fecured according to the faid ftatutes, but then and at all times wholly refufed fo to do, and wholly rejected and excluded the fame; *whereby the plaintiffs were deprived*

1810.

ALLNUTT against INGLIS.

prived of the benefit which would otherwise have accrued to them from lodging and warehousing the said goods, without payment of the said duties, and have been obliged to advance and pay the said duties thereon to the amount of 500*l*., and have thereby lost the interest and profits they would otherwise have made of the said sum, and also their goods remained unhoused a long time, and were injured, &c.

The defendant by his plea, protesting that the hire and reward offered by the plaintiffs to the company for warehousing the goods was reasonable, pleaded that before the time when the company was so required by the plaintiffs to admit and receive the said goods, and to permit the same to be lodged and secured as aforesaid, to wit, on the 1st of *September* 1809, *the company published a table, containing the terms of hire and reward for which alone they would receive the goods of any person into their warehouses*, or permit the same to be there lodged or secured; *which terms of hire and reward exceeded the terms of hire and reward in the declaration mentioned:* of all which premises the plaintiffs had notice: and that the plaintiffs at the time when they required the company to admit and receive the said goods, and permit the same to be lodged and secured as aforesaid, refused to pay and to agree to pay the company hire and reward in respect of the said goods according to the terms contained in the table so published: and because the plaintiffs refused so to do, the company refused to admit or receive the said goods into their warehouses, or permit the same to be there lodged or secured, as it was lawful for them to do in that behalf, &c. To this there was a general demurrer.

 Richardson

1810.

ALLNUTT against INGLIS.

Richardson for the plaintiffs. The reasonableness of the hire and reward offered by the plaintiffs to the company for the privilege of warehousing their goods in its warehouses, without the immediate payment of the import duties, is admitted: and the question is whether the company were bound to receive the goods upon those terms. It is a general rule of law, that where a party has a monopoly granted to him for public purposes, he is bound to render the service or use of the thing to which his privilege is annexed for a reasonable compensation. Lord *Hale*, in his treatise de portibus maris (a), says, "a man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers may agree for cranage, wharfage, &c; for he doth no more than is lawful for any man to do, viz. makes the most of his own," &c.—"If the king or subject have a *public* wharf, unto which all persons that come to that port must come and unlade or lade their goods, as for the purpose, because they are the wharfs only licensed by the queen, according to the *st.* 1 *Eliz. c.* 11., or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's licence or charter; *for now the wharf and crane and other conveniences are affected with a public interest*, and they cease to be juris privati only. As if a man set out a street in a new building on his own land, it is now no longer bare private

(a) Vol. 1. of Tracts published by Mr. *Hargrave*, part 2. ch. 6. p. 77.

interest,

interest, but it is affected with a public interest." [Lord *Ellenborough* C. J. I suppose it is admitted on the part of the company, that as the law now stands and has been acted upon, there is no other place in which these wines could have been bonded. *Le Blanc* J. I take it that wines coming elsewhere than from the *East* or *West Indies* cannot, under the bonding act, be bonded in any other place in the port of *London* than in the *London* docks.] Unless the goods were protected by the second section of the *st.* 43 *G.* 3. *c.* 132. they would have been liable to forfeiture for non-payment of duty on importation, if warehoused elsewhere than in these warehouses. On the same principle of a monopoly, it is said in *Saville* 14., that the properties of every ferry, are to have an able ferryman, a present passage, and reasonable payment for the passage. And in *Bolt* v. *Stennett* (*a*), where the question was, whether the public had a right to use a crane erected on one of the public wharfs in *London*; it was considered by this court, and also by Lord C. J. *Eyre*, in a case between the same parties (*b*), that the public had such a right on paying a reasonable satisfaction to the owner. Then under the warehousing act, the intent of the legislature was not merely to confer a benefit upon the *London* dock company, but to make them the instruments of a public benefit to the trade of *London*: and the company having accepted the monopoly cum onere, and knowing such to have been the intent of the legislature, they cannot now convert it into an engine to extort unreasonable rates. By the original *London* dock act, 39 & 40 *G.* 3. *c.* 47. no mention is made of *warehouses*, but authority is given to the company to make

(*a*) 8 *Term Rep.* 606. (*b*) Cited *ib.* 608-9.

1810.

ALLNUTT *against* INGLIS.

wet docks and wharfs, for which certain rates are given to them by *s.* 59. as a compensation, which of course the legislature must have intended to be reasonable; *s.* 67. gives them a monopoly for the landing of all wines not brought from the *East* or *West Indies*. Then came the general warehousing act, 43 *G.* 3. *c.* 132., allowing goods warehoused in these and other certain warehouses to be bonded, without immediate payment of duties; the object of which is recited in the preamble to be, that "it would greatly tend to the encouragement of the trade and commerce of *Great Britain*, and to the accommodation of merchants and others," &c. The circumstance of these warehouses being surrounded by a wall facilitated the extension of the benefit to them, and thereby enabled them to become the instruments of the general benefit; and *s.* 2. makes it lawful for the merchants to warehouse the goods enumerated in schedule B. of the act in these warehouses. If the clause had stopped there, it would clearly have been compulsory on the company to have received the goods; but the latter part of the clause renders that more doubtful; and it will be contended that the effect of the regulation is merely to protect from penalties the owners warehousing their goods there without first paying the duties: yet taking the whole scope and view of the clause together, it would be illusory to make it lawful for the merchants to warehouse their goods there, if the company were not bound to receive them: for merchants might be induced by that privilege to speculate upon importing goods, the duties of which often amount to much more than the prime cost of the goods; and if they were obliged, by the refusal of the company to receive them into its warehouses, to pay the duties immediately, it would operate to the ruin of many. If then

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the company did not mean to dedicate their warehouses to the public use in this manner, they ought to have made their stand in the first instance, and should have declined taking the certificate of the lords of the treasury, conferring the exclusive privilege, which issued with their own consent. And if this were otherwise, and the company could refuse to receive the goods of the merchants except upon their own terms, the act would be for the benefit of the company, and not of trade in general, which it would rather encumber. By *f.* 10. the king by order in council may extend the benefit of the bonding system to the outports, where proper warehouses are found for the security of the goods and of the revenue; and by *f.* 17. the expence of warehouse rent and charges shall in all cases be paid by the importer, proprietor, or consignee. And in case any warehouse shall be provided at the charge of the crown for the purposes of the act, the importer, &c. shall pay to the person appointed by the commissioners of customs to receive it "warehouse rent for such goods, &c. to be estimated "according to the *usual rate* of such rent for the like articles paid at the port of importation." Now it would be extraordinary that when the crown is restricted to take only the *usual rate* of warehouse room, which must be understood to be the *reasonable* rate of compensation, (for what is usual must be presumed to be reasonable,) this company should be left unrestrained: and this shews that the legislature must have conceived that the company were so restrained by the legal operation of the second clause extending the privilege of the bonding system to their warehouses.

Bosanquet,

1810.

ALLNUTT *against* INGLIS.

Bosanquet, contrà. Every person is entitled to make the best use of his own property, and the only exception to the rule is in cases where the owner has so entirely dedicated the use of it to the public, that he cannot resume the exclusive possession of it again; as in the instance of a highway, or ferry. So if one accept a grant from the crown of land on the sea shore or the bank of a navigable river, in a public port, for the purpose of erecting a public wharf or quay, he cannot disuse it, but is bound to preserve it for its destined purpose. If a man open a public house, he cannot refuse to entertain travellers; if he set up as a public carrier, he cannot refuse to carry: but he may limit his engagement with the public, and then he is not bound to admit travellers in the one case, or to carry goods in the other, upon any other terms than those upon which he engaged. [Ld. *Ellenborough* C. J. It must be recollected that in those cases there is a power in the public of increasing the number of public houses or of carriers indefinitely.] Admitting that to be so; it remains to be considered upon what the liability of the company to receive goods upon any other than their own terms rests; whether on the nature of the trade, or the particular privilege conferred, or on the particular provisions of the acts of parliament. The original act of the 39 and 40 *G*.3. *c*.47. constitutes the subscribers a company for certain purposes defined by the act, of which the receipt of goods in warehouses is not one. By *f*. 58. the property of all erections, &c. made by the company is vested in them: *f*. 54. specifies the only works they are bound to perform for the monopoly which is given to them; and that monopoly is by *f*. 67. confined to the landing of goods within the docks or on the quays, or wharfs

1810.

ALLNUTT *against* INGLIS.

wharfs belonging thereto, and they have no monopoly of warehousing: and *f.* 59. limits the tonnage rates they are to receive from vessels using the docks for certain enumerated services, and therefore all other rates not included in that list must stand upon the same footing as in the case of every other trading company, for which they are entitled to make their own bargain. The *London* Assurance Company, it is well known, contract at a premium rather higher than the ordinary rate of insurance. If this company had built counting houses instead of warehouses, might they not have let them for as much as they could get? [Lord *Ellenborough* C. J. The business of insurances and of counting houses may be carried on elsewhere, and therefore such instances do not apply. The only question arises on the bonding act: shew us that wines may be bonded elsewhere.] Assuming then that before the warehousing acts, (43 *G.* 3. *c.* 132., and 44 *G.* 3. *c.* 100.) the company might have charged what they pleased for warehouse rent; the first act is general, and not confined to this company, though *f.* 2. applies to them. Before that time upon special application goods were permitted to be bonded in particular places: this act made a general provision for bonding in certain places then prepared or to be prepared and certified. This was a boon given to the trade, and not by way of monopoly to this company; for there was no contract with the owners of any of the privileged warehouses that other warehouses should not be licensed; and there are in fact now other warehouses licensed for bonding wines besides those within the docks. [Lord *Ellenborough* C. J. [illegible] whether the *London* dock company were not them[illegible] the occupiers of those other warehouses?] And it [illegible]ted that they were; but it was insisted that as the

1810.

ALLNUTT against INGLIS.

the crown is not restrained from licensing other warehouses, it cannot be considered as a monopoly in the company, so as to make the rule of law attach upon them. [Lord *Ellenborough* C. J. If the privilege should be extended to other warehouses, it will only be a more extended monopoly in the company and in the owners of the other priveleged places.] The general power of the crown to license as many bonding warehouses as it pleases is not fettered by the act. *S.* 6. and 7. of the stat. 43. *G.* 3. *c.* 132. referring to a different class of goods in schedule E. makes it lawful for the importer of any such goods to lodge them in any warehouses (*i. e.* private) to be provided and certified by the treasury under the joint locks of the crown and the merchant, without payment of the duties at the time; and many such are licensed. But wines and other liquors can only be warehoused in vaults under ground; for the heat and agitation of the building above would be too great for such commodities; and therefore the buildings must be previously adapted to them. The peculiar adaptation of the company's vaults for this purpose has led to the extension to them of the bonding system; but they have no monopoly granted to them, and therefore the laws of monopoly cannot attach on them. Then the stat. 44 *Geo.* 3. *c.* 100. for warehousing goods within these docks specifies (*s.* 12.) the rent to be paid for warehousing of tobacco, but says nothing as to the warehouse rent for wines; from whence it may fairly be presumed that the legislature did not mean to confine them in respect of any other commodity than tobacco. Under *s.* 6. of the same act, payment of the duties on all goods landed in the *London* Docks [illegible] be delayed for 37 days before they are liable to [illegible] and sold by the commissioners of customs or [illegible]

ger of excise for payment of the duties: and this might as well be said to confer such an exclusive privilege as would attach on them the law of monopoly. *Bolt* v. *Stennett* (a) was the case of a public quay, which having been originally granted by the crown for that purpose could not be resumed nor diverted to other purposes: but there is nothing to prevent this company from converting their warehouses immediately to other purposes, or from prostrating them.

Richardson in reply was desired by the Court to consider how far the company was pledged to continue to apply its warehouses to this purpose; and also how far the crown was restrained from licensing other warehouses in other hands in the port of *London* for the same purpose. He denied that the company, having accepted of this privilege to their warehouses for the benefit of the public as well as of themselves, could throw them up at their own pleasure, without reasonable notice to the crown; for if so, the public might be deserted just at the moment of need, and after the merchants have committed themselves and incurred expence and risk upon the faith of the engagement between the crown and the company. It must be understood that when the company accepted the certificate conferring the exclusive privilege, they took it with all its burthens, and cannot withdraw from it: and while their term is running, the legislature declares that it shall be lawful for the importers, &c. of goods to warehouse them in the company's warehouses, without payment of the duties at the time, provided they are certified by the treasury; which has been done. But at any rate, supposing the company

(a) 8 *Term Rep.* 606.

1810.

ALLNUTT *against* INGLIS.

company could withdraw their warehouſes from this uſe, with or without notice, it is ſufficient in this caſe that they have not done ſo; and while they in fact enjoy the monopoly, they muſt take it cum onere. Then ſuppoſing other outlying warehouſes have been licenſed, the argument is not varied againſt the company under whoſe control they are. And ſuppoſing others were alſo licenſed, that would not deſtroy but only extend the monopoly.

Lord ELLENBOROUGH C. J. The queſtion on this record is whether the *London* Dock Company have a right to inſiſt upon receiving wines into their warehouſes for a hire and reward arbitrary and at their will and pleaſure, or whether they were bound to receive them there for a reaſonable reward only. There is no doubt that the general principle is favoured both in law and juſtice, that every man may fix what price he pleaſes upon his own property or the uſe of it: but if, for a particular purpoſe, the public have a right to reſort to his premiſes and make uſe of them, and he have a monopoly in them for that purpoſe, if he will take the benefit of that monopoly, he muſt as an equivalent perform the duty attached to it on reaſonable terms. The queſtion then is, whether circumſtanced as this company is by the combination of the warehouſing act with the act by which they were originally conſtituted, and with the actually exiſting ſtate of things in the port of *London*, whereby they alone have the warehouſing of theſe wines, they be not, according to the doctrine of Lord *Hale*, obliged to limit themſelves to a reaſonable compenſation for ſuch warehouſing? And according to him, wherever the accident of time caſts upon a party the benefit of having a legal monopoly of landing goods in a public port, as

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1810.

ALLNUTT against INGLIS.

where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord *Hale* puts the case either way; where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either "because they are the "wharfs *only licensed* by the queen, or because there is "*no other wharf* in that port, *as it may fall out*: in that "case, (he says) there cannot be taken arbitrary and ex-"cessive duties for cranage, wharfage, &c.: neither can "they be inhanced to an immoderate rate; but the duties "must be reasonable and moderate, though settled by "the king's licence or charter." And then he assigns this reason, "for now the wharf and crane and other "conveniences are affected with a public interest, and "they cease to be juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company but for the good of trade. The first clause (*a*) says that it would greatly tend to the *encouragement of the trade and commerce of* G. B., *and to the accommodation of merchants and others* if certain goods were permitted to be entered and landed and secured in the port of *London* without payment of duties at the time of the first entry: and then it says that *it shall be lawful* for the importer of certain goods enumerated in table A. to secure the same in the *West India* dock warehouses: and then by *s.* 2. other goods enumerated in table B. may in like manner be secured in the *London* dock ware-houses.

(*a*) 43 *G.* 3. *c.* 132. the general warehousing act.

1810.

ALLNUTT *against* INGLIS.

houses. And there are no other places at present lawfully authorized for the warehousing of wines, (such as were imported in this case) except these warehouses within the *London* dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it adviseable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction: and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord *Hale* in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose,

pofe, they are bound to let the trade have the ufe of them for a reafonable hire and reward.

1810.

ARNOTT against INGLIS.

GROSE J. The company contend that they may take what warehoufe rent they pleafe: but if they have a monopoly of the warehoufing for this purpofe, we cannot fay that the legiflature intended that they fhould take any price they chofe to impofe upon the importer; for if they could, it would violate the general intention of the act, which was to promote and affift trade, and not to prejudice it, which the company would be enabled to do if they could enhance their demand for warehoufe rent to any extent they pleafed. And if we attend to the principle of law by which monopolies are regulated, and apply to this cafe what is laid down by Lord *Hale* upon that fubject, it is impoffible to fay that this company do not come within that principle.

LE BLANC J. We can only look to the fituation of the parties as they appear upon this record, and with reference to the acts of parliament. The company are proprietors of warehoufes in the port of *London*, which they were not under any obligation to erect by the original act conftituting them a company: they ftood therefore before the paffing of the general warehoufing act in the fame fituation as other proprietors of warehoufes. Then the warehoufing act was paffed, which is expreffed to be for the encouragement of trade and the accommodation of the merchants and others: and by the 2d fection it is made lawful for the importer to fecure thefe goods in the *London* dock warehoufes without paying the duties upon entry; and it does not appear at prefent that that privilege is extended either by act of parliament or by

1810.

ALLNUTT *against* INGLIS.

any other competent authority to any other than the warehouses belonging to the company. Then admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance; yet having, as they now have, this monopoly, the question is whether the warehouses be not private property clothed with a public right; and if so, the principle of law attaches upon them. The privilege then of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but only a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and though it does not follow that the rent in fact fixed by them is unreasonable, they do not chuse to insist on its being reasonable, for the purpose of raising the question. For this purpose therefore the question may be taken to be, whether they may claim an unreasonable rent? But though this be private property, yet the principle laid down by Lord *Hale* attaches upon it, that where private property is affected with a public interest, it ceases to be juris privati only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. That principle was followed up in the case of *Bolt* v. *Stennett*: for there the quay being one of the public quays licensed under the statute of *Elizabeth*, it was held that the owner was bound to permit the use of the crane upon it, and could not insist either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the

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use of it upon reasonable terms. Whether the company be bound to continue the use of their warehouses for this purpose may hereafter be material to be decided, but no question arises upon that at present: the warehouses are still applied to the purpose, and there was room sufficient to have received these goods at the time; and the only question was whether they were bound to receive them for a reasonable rent: this they refused to do, and in that refusal they were wrong.

BAYLEY J. The question is whether the company have a right to impose their own terms, whether reasonable or not, upon the importers of these goods who offered to deposit them in their warehouses upon the terms of the warehousing act? For if so, they might exclude particular individuals from the benefit of the act. Or the question may be stated to be whether the public have not a right under that act to deposit and secure certain goods in the company's warehouses upon reasonable terms, and whether the company be not bound to receive such goods from all the public? Now the act is declared to be passed for the benefit of the trade in general and for the accommodation of the merchants: and it proceeds afterwards to say that it shall be lawful for the importers, &c. (meaning all importers, and not particular individuals of them) to secure their goods of a certain description in the company's warehouses. But according to the argument now urged for the company, the act was not passed for the benefit of *all* importers, but of such only as chuse to pay the company what they are pleased to demand for warehouse rent; for to this length the argument necessarily goes. It is said however that the company have not a monopoly of this privilege: but I am not aware of any act of par-

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1810.

ALLNUTT *against* INGLIS.

liament which gave the commissioners of the treasury any power to licence particular places for the bonding of *wines* before this act; though I know they had such a power with respect to sugar and coffee. But whether they had it or not, it is sufficient to say that these were the only warehouses where the importer had a right to insist that his goods should be warehoused and bonded; for he certainly could not have obliged the commissioners to licence any other place for that purpose. As to the question whether the company may renounce the application of their warehouses to this use, I cannot add to what the Court have already said: but at least they cannot renounce it partially: and I think it would be deluding the public if the company were able to renounce at a moment's warning the warehousing of the goods for this purpose after they had agreed to accept the licence and monopoly.

Judgment for the plaintiff.

Tuesday, July 3d.

CHATLAND *against* THORNLEY.

The plea of an attorney to an action sued against him by bill, stating his privilege not to be compelled to answer any bill exhibited against him in the custody of the marshal, &c. and concluding that the Court would not take *further cognizance of the action aforesaid against him*, [instead of praying judgment of the bill, and that it might be quashed] will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its attornies *in that form*; and therefore the Court will adjudge the bill to be quashed.

THE plaintiff brought "her bill against *Edward Thornley*, being in the custody of the marshal of the Marshalsea, &c. of a plea of trespass, and proceeded to declare against him as acceptor of a bill of exchange, &c. To which the defendant in his own proper person came and said that he is now, and at the time of exhibiting

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1810.

CHATLAND *against* THORNLEY.

the plaintiff's bill against him, and before, was one of the attornies of the court of our lord the now king before the king himself (the said court being at *W.* in the county of *M.*) as by the roll of attornies of this court here fully appears: and so he proceeded to plead his privilege, in the usual form, not to answer any bill exhibited against him in the custody of the marshal, &c., or in any other manner whatsoever, except by bill to be exhibited against him as an attorney of this court upon any pleas, &c.: and then concluded — wherefore he apprehends that the Court here will not and ought not *to take further cognizance of the action aforesaid* depending against him, &c.

To this the plaintiff demurred, and shewed several special causes, of which the only one spoken to was, that the conclusion of the plea was informal, inasmuch as it concluded with a suggestion that the Court would not take further *cognizance of the action*, instead of praying *judgment of the bill, and that the same might be quashed*, or praying judgment if the defendant ought to answer thereto. And *Tindal* argued from this conclusion of the plea, that it must be taken to be a plea to the jurisdiction; being a proper conclusion only for such a plea: and that as a plea to the jurisdiction it would clearly be bad for want of giving another competent court. But

The Court said that it was not to be considered as a plea to the jurisdiction: it only objected to the Court's taking cognizance of the action against one of its attornies in this form: it does not deny that the Court have jurisdiction in another form. Therefore they gave judgment that the Court would not take further cog-

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1810.

CHATLAND *against* THORNLEY.

nizance of the action in this form, and that the bill be quashed (*a*).

Bowen for the defendant.

(*a*) Vide *Le Bret* v. *Papillon*, 4 *East*, 502. *Chatterley* v. *Winstanley*, 5 *East*, 271. and *Rex* v. *Shakespeare*, 10 *East*, 83.

Wednesday, July 4th.

The KING *against* TOPHAM.

Where the appellant disputed before the sessions the quantum of the rate, as well as the rateability of the property for which he was assessed, which was tithe rents and compositions under an inclosure act, it is not enough for the parish officers to shew that he was in the receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence.

THE defendant appealed against a poor's rate made for the township of *Great Driffield* in the East Riding of the county of *York*, and the sessions confirmed the rate, subject to the opinion of this Court on the following case.

The defendant was rated as occupier of property of the annual value of 250*l.*, and he appealed against the rate, giving notice of the grounds of his appeal, 1st, that he had no rateable property in the parish; and 2dly, that he had not rateable property to the amount at which he was rated. On the part of the respondents it was proved that the appellant was in the annual receipt of certain tithe rents originating in the *Driffield* inclosure act, (which act was admitted as part of the case) of the annual value of 6*s.* 8*d.* It was further proved that certain other sums were received by him for such tithe rents, but there was no proof of their amount. Here the respondents closed their case; insisting that as they had proved the appellant to be in possession of some rateable property, it was incumbent on him to prove that in fact he had been overrated. The appellant, on the contrary, insisted that this composition

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or rent was not rateable at all. The sessions held that it was rateable. The appellant then contended that as there was no proof of any specific sum having been paid beyond the *6s. 8d.*, the rate ought to be amended by inserting that sum instead of the 250*l.* The sessions held that the proof of overrating lay on the appellant; and confirmed the rate generally.

1810.

The King *against* Topham.

The act referred to was one passed in the 14 *G.* 2 *c.* 11. for dividing and inclosing open fields, &c. in *Great* and *Little Driffield*, and for settling certain yearly payments to the prebendary of *Driffield* in lieu of tithes, pursuant to an agreement and award made for those purposes: it states that by an agreement tripartite made between the lord of the manor and owner of several lands, &c. the prebendary of *Driffield* and his lessee, to which prebend the tithes of corn, grain, hay, wool, and lamb belonged, and the vicar and others named, owners and proprietors of lands, &c., the inclosure of these townships was to be made in the manner therein stated: and that a certain *composition in money* was to be paid by the land owners to the prebendary for the time being and his lessee, &c. in lieu of the tithes; and that for fixing and settling the said yearly rents and compositions in lieu of the tithes, all the parties had appointed certain referees, who had awarded to the prebendary of *Driffield* for the time being and his successors, &c. "*as a yearly rent or composition in lieu of the tithes of corn, grain and hay therein*, the rent or sum of 276*l.*, being after the rate of 1*l.* 10*s.* for every oxgang; and, in lieu of the tithes of wool and lamb, the yearly rent or sum of 30*l.* &c." The act therefore proceeded to give effect to such agreement and award; and enacted, that *in lieu and satisfaction of the*

1810.

The King *against* Topham.

said tithes there should be the said several *yearly compositions, rents or sum* of 267*l.*, &c. issuing out of the said inclosed lands, &c. to be paid by the owners and proprietors thereof in certain proportions to be ascertained by the commissioners. And that if the said *annual composition rents* should be in arrear, the prebendary for the time being, &c. might enter and distrain in the particular lands charged, &c. And that in all future rates and levies in the said townships the said *composition rents* should be assessed *in the same proportion* as the other land-holders (*a*).

Park and *Holroyd* were to have supported the order of sessions confirming the rate; but after the case was stated,

Lord Ellenborough C. J. said — The question is whether a person, who I will suppose for the present is liable to be rated for something beyond the 6*s.* 8*d.*, can be rated to the amount of 250*l.*, and then left to pare down that assessment, upon an appeal, to the amount which it ought to be. He might as well have been charged to the extent of 50,000*l.* [*Park* said that he could not pretend to argue that that could be done; but that here the act of parliament itself which was before the Court stated the amount of the tithe rents and compositions at more than the sum for which the appellant was rated. On which his Lordship observed—] It is not stated as a fact in the case that the appellant was in the receipt of the rents and compositions to the amount

(*a*) The appellant in this case was in fact the lessee under the prebendary, and disputed his liability to be rated for this property *as rents*, not being an actual inhabitant of the township; and gave the notice of appeal stated in the case. Vide *Rex* v. *Toms*, *Dougl.* 401.

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1810.

The KING against TOPHAM.

of 250*l*. If the sessions have proceeded upon what the Court has said in some cases, that if the party rated have rateable property in the parish, they will not inquire into the quantum of the rate, they have egregiously mistaken what the Court meant. When the question before the sessions is upon the quantum of the rate, the officers making it must show to the justices some probable ground for the amount at which they charge the party in the rate. The mischief of any other rule would be enormous: a small occupier may be rated at once in the round sum of 1000*l*., and left to struggle his way out of that charge as he can.

Const, *Richardson*, and *Coultman*, were to have argued for the appellant. The latter said that the question made at the sessions was, whether the appellant should begin by proving his case, that he was overrated; or whether the parish officers should begin by proving a probable case for rating the appellant at so much. On which *Le Blanc* J. observed that the Court would have no difficulty in dealing with that naked proposition whenever it should be brought nakedly before them.

Lord ELLENBOROUGH C. J. then directed the case to be sent back to the sessions to be re-heard, re-considered, and re-stated.

Wednesday, July 4th.

The KING *against* The Inhabitants of MAIDSTONE.

The sessions stated the facts, that the pauper was hired on *Michaelmas-day*, 10th of *October* 1797, for a year ending on *Michaelmas day*, 10th *October* 1798; that he continued to serve till the 8th of *October*, when he married, *and his master consented to his leaving his service*, and paid him his full wages, and on the 9th the pauper hired himself to and went into the service of another master: held by one Judge that these facts would have warranted the sessions in drawing a conclusion of fact that the master dispensed with the service for the remaining day of the year; but the sessions having impliedly drawn a different conclusion by quashing the order of removal, all the Court held that the case, as stated, shewed a dissolution of the contract before the end of the year, and consequently that no settlement could be gained by such hiring and service.

The husband being found to have gone beyond sea above two years before the birth of a child borne by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard.

TWO justices by their order removed *Ann* the wife of *George Langridge*, who had deserted her, and *Elizabeth* aged 9 years, *Frances* aged 2 years, and an infant male child not baptized, aged about 3 months, her children, from *Maidstone* to *Thurnham*, in *Kent*: the Sessions on appeal quashed the order, subject to the opinion of this Court on a case, which stated that the order of removal made was dated the 13th of *August* 1808. That *George Langridge*, the husband of the pauper, previous to *Michaelmas* 1797, was a settled inhabitant of *Bletchingly* in *Surry*, and at *Michaelmas* 1797 hired himself at the wages of 12 guineas for a year to *S. Tomkin* of *Thurnham* to serve him as a waggoner; and entered upon his said service, and continued in it till the 8th of *October* 1798, on which day he was married to the pauper, *and his master consented to his leaving his service*, and paid him his wages. A few shillings were deducted by his master for the loss of a skid chain of a waggon, and for the wages of a labourer who was employed in the place of *Langridge* for one day during his absence at an early period of the said service; but nothing was substracted from his wages on account of leaving his master on the 8th of *October*. *Langridge* on the following day, the 9th of *October*, hired himself to and went into the service of one *Stone*. *Michaelmas* day fell on the 10th of *October* in the years 1797 and 1798. In 1803 *Langridge* entered into the *Sussex* militia, and having af-

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terwards volunteered into the 35th regiment, embarked for *Sicily* in *April* 1806, where he remained till he returned to *England* on the 4th *January* 1808. *Elizabeth*, named in the order, was born on the 9th of *January* 1806; and the child, not yet baptized, was born in the parish of *Maidstone* on the 5th of *May* 1808. While the pauper's husband was thus absent with the regiment, the parish of *Thurnham* frequently paid her money for the support of her child, though she was resident during all the time either in *Maidstone*, (where the child was at nurse,) or in other parishes, but not in *Thurnham*. The maiden settlement of the pauper was in *Thurnham*.

It was also agreed upon the argument to be added as a fact to the case, that *Ann Langridge*, the wife, continued in *England* all the time that her husband was abroad with his regiment. And thereupon the Court all agreed that the youngest child must be taken to be a bastard; and was therefore settled in the place of its birth; though for the present it must go with the mother for nurture.

Gurney then contended, in support of the order of sessions, that the husband of the pauper *Ann* did not gain a settlement in *Thurnham* by the hiring and service stated; for in fact he served one day short of the year, having been hired on *Michaelmas-day* the 10th of *October* 1797, and having quitted the service on the 8th of *October* 1798, *Michaelmas-day* being on the 10th; and there was no dispensation of the service for the remainder of the year, but a dissolution of the contract, on occasion of the marriage of the pauper. There having been no deduction made, on account of the loss of the one day's service, in the payment of the wages, makes no difference in the

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1810.

The King against The Inhabitants of Maidstone.

case, according to *Rex* v. *Castlechurch* (a); for it is not only stated that the master consented to *Langridge leaving his service* on the 8th; which is the common mode of describing a dissolution of the relation of master and servant; but the man on the 9th contracted with a different master, which was inconsistent with his former contract. He also referred to *Rex* v. *St. Peter of Mancroft in Norwich* (b), and *Rex* v. *Sudbrook* (c), as supporting the conclusion that this was a dissolution of the contract.

Berens and *Bolland*, contrà, contended, that the facts stated only shewed a dispensation of the service by the master upon occasion of the marriage of his servant; and the subsequent act of the servant, in hiring himself to another on the last day of the year, could not convert the prior act of the master into a dissolution of the contract. They referred to *Rex* v. *Bray* (d), *Rex* v *Potter Higham* (e), and *Rex* v. *Richmond* (f). In the latter case the wife of the servant leaving the service 13 days before the end of her husband's year, the master asked him whether he should not like to go too; to which the man assented, received his whole year's wages, and went away: and this was held to confer a settlement. [Lord *Ellenborough* C. J. This case states expressly that the master consented to the servant *leaving his service*: and how, upon that statement, can we say that this was a mere dispensation of the service? If this opinion contradict the case of the *King* v. *Richmond*, which I do not mean to say that it does, I cannot help it: the statute, and the constructions which have been put on it, all concur in re-

(a) *Burr. S. C.* 63. (b) 3 *Term Rep.* 477. (c) 4 *East*, 356.
(d) *Burr. S. C.* 682. (e) *Ibid.* 690. (f) *Ibid.* 740.

quiring that the relation of master and servant should continue for the whole year.] They admitted the critical force of these words as stated in the case; but said that that was not the meaning of the parties in drawing it up. They then adverted to the relief stated to have been given by the parish of *Thurnham* to the pauper for her child while she resided in *Maidstone*, as evidence of their acknowledgment of her settlement in *Thurnham* independently of the other facts stated.

But Lord ELLENBOROUGH C. J. said, that however in the absence of all other circumstances, such as those stated in this case, the inference of a settlement in the parish might be drawn from the fact of such relief; yet here no such inference was wanted to be made, the Court having all the facts before them of the hiring and service which was the foundation of the supposed settlement. The giving that relief amounts to more than shewing the *opinion* of the parish upon these facts, that the pauper was settled with them. His Lordship then continued.—

This was clearly a case of dissolution of the contract of hiring; and when the legislature has given us a rule to go by, it is better to abide by that. I should have been sorry in any case to have originated the question of dispensation of service; but it has been established to a certain extent by the decisions, and so far let it stand; but I will not extend it further. Here, however, there is no authority right or wrong for extending it; for it is stated that *the master consented to his servant's leaving his service*, and I know not in what stronger terms a servant could answer in a plea to an action by the master against him for

1810.

The King against The Inhabitants of Maidstone.

for deserting his service: the master would undoubtedly be bound by such a plea, and would not venture to demur to it. Then, though the opinion of the parties is not to be pressed, yet their acts are material, upon the question of dispensation or dissolution; and here it is stated that after *Langridge* had left his first master's service on the 8th, he went on the following day, which was the day before *Michaelmas-day*, and hired himself into the service of a new master. Here then we have an express renunciation on the part of the master of his rights over the servant two days before the end of the year; and the servant's assent to this, signified by his departure from the service, and contracting the next day an obligation to another master, into whose service he entered immediately, subject to all the rights of the new master over his service. How then can I say in the words of the statute of *William* (*a*), that there was *a continuing and abiding* by the servant *in the same service during the space of one whole year*, when it appears that that period of service was abridged by the two last days of the year. It would, I think be contravening the clear commands of the legislature, if we did not hold this to be a dissolution of the contract.

Grose J. In two of the cases cited by the respondent's counsel, the whole year's wages were indeed paid; but here the servant, acting upon his master's consent that he should leave his service, entered into a new contract with a new master.

Le Blanc J. Upon the facts of the case as it appeared at the sessions, I think they would have been well founded

(*a*) 8 & 9 *W.* 3 c 30.

in

1810.

The KING against The Inhabitants of MAIDSTONE.

in finding as a fact that this was a dispensation of the service on the part of the master, and not a dissolution of the contract; for according to the cases, it is always a question for the sessions to decide, whether the consent of the master to the servant's leaving his service a few days before the end of the year for a particular purpose, but paying him his whole year's wages, be a dispensation of the service for the remainder of the year, or a dissolution of the contract. Here the servant wanted to marry, and one entire day before the end of the year the master gave him leave to marry and go away from his service. It was a fair and reasonable conclusion to draw, that if the servant wished to go away one day before the end of his service for the purpose of marrying, the master would have no objection to dispense with his service and give him a holiday for that one day; for it must be observed, that the service would have ended on the 9th, and the servant left his master's service on the 8th. But the sessions not chusing to draw this conclusion themselves, which I think they might have done, send the case to us upon the dry facts stated, and have not found that the master did consent to give his servant a holiday and to dispense with his service for the remaining day of the year; but merely state as a fact that the master consented to his *leaving his service*. Under these circumstances I cannot say that the sessions have done wrong in quashing the order of removal to *Thurnham*; though I think they might have drawn a different conclusion from the facts of the case.

BAYLEY J. It appears to me that the sessions have done right in quashing the order of removal as they have done. In order to constitute a case of dispensation of service, I think

1810.

The King *against* The Inhabitants of Maidstone.

think the master should have power to recal the servant to his service all through the year: but, where the master agrees generally to let the servant go away from his service without reserving to himself the right of recalling him throughout the whole year, I think that puts an end to the contract of service altogether.

Order of sessions confirmed.

Wednesday, July 4th.

The King *against* The Chapelwardens of the Township of Haworth, in the Parish of Bradford, in the West Riding of the County of York.

A rate to *reimburse* churchwardens such sums as *they* had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part *retrospective*; and therefore the Court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the Court would not grant the mandamus to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves.

THIS was an application for a mandamus to these defendants to make a rate upon the inhabitants of their township for levying 50*l.* being 1-5th part of a church rate charged upon the parish at large, for *reimbursing* the churchwardens of the town of *Bradford* such sums as they had expended or might thereafter expend on the parish church of *Bradford*: and to pay the said 50*l.* when raised to those churchwardens. The relator's affidavit stated that the parish of *Bradford* consisted of 15 townships, of which *Haworth* is one, and that there is an immemorial custom in the parish, that each of the townships should contribute to the church rates in certain proportions stated, of which the proportion of *Haworth* was 1-5th. That at a vestry held in the parish church on the 4th of *April* last, after regular notice, it was ordered that the churchwardens of *Bradford* should collect the rate in

question

question of 250*l.* for *reimbursing* themselves such sums as they had expended or might thereafter expend on the parish church of *Bradford*: and then stated a demand and refusal of the proportion of the rate payable by the defendants.

Paley, in answer to the rule for the mandamus, objected, first, that any custom for fixing on a part of a parish a certain proportion of a church rate, which ought to be equally distributed on all the parishioners, was bad upon the face of it, as making that certain and invariable which in its very nature was variable and fluctuating; and however equally the proportions might have been distributed in the first instance, yet they had now by the fluctuations of population and property become unequal and unjust. This question, he said, was not decided in *Stead* v. *Heaton* (*a*), which turned on another point, as to the evidence of the custom. [Lord *Ellenborough* C. J. We shall not decide this question upon affidavits, but shall for this purpose assume the custom to be good. The point however did not pass without consideration in *Stead* v. *Heaton*.] Secondly, he objected that no rate could be made to *reimburse* churchwardens; for they were not bound, nor ought they, to lay out money till they had collected it in hand: for otherwise they might lay out more than was allowed by the justices, and then charge the parish for the excess. And non constat that it is to reimburse them what they have expended within the same year: it may have been for expences incurred many years ago by other churchwardens for former inhabitants. And it makes no difference that this is a rate to reimburse the same churchwardens by whom the money was expended.

(*a*) 4 *Term Rep.* 669.

1810.

The King against The Chapel-wardens of Bradford.

expended. He cited *Dawson* v. *Wilkinson* (a), and *Tawney's* case there cited, which is reported in Lord *Raymond* (b), both which negative the power of churchwardens to make a rate to reimburse either themselves or former churchwardens.

Park and *Walker* observed that the rate was not merely to *reimburse* former but also to provide for future expenditure. They said that this rate was made in the same form that had always been adopted in this parish without objection. That in *Tawney's* case it was admitted, that where money had been properly laid out by parish officers, (which was not disputed in this case,) the Court would grant a mandamus to the justices, to sign and allow a rate in the *general* form for the relief of the poor, though in fact made for the express purpose of reimbursing the parish officers: the objection was therefore more a matter of form than substance; and they urged the Court to grant the mandamus in the common form, without noticing the purpose of reimbursement.

Lord Ellenborough C. J. The regular way is for the churchwardens to raise the money before hand by a rate made in the regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time on whom the burthen ought properly to fall. It will indeed sometimes happen that more may be required to be expended at the time than the actual sum collected will cover: but still it is admitted that the inconvenience has been gotten rid of in such cases by an evasion; for the rate has been made in the common form, and when the churchwardens have col-

(a) *And.* 21. and *Rep. temp. Hardw.* 381. (b) 2 *Ld. Raym.* 1009.

lected the money, they have repaid themselves what they had disbursed for the parish. But we cannot now grant the mandamus to make a rate in the common form; for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the churchwardens of *Bradford* for money which they had expended, as well as for what they might expend; and the refusal of the defendants to make such a rate applies to the form of the demand; and we cannot now qualify their refusal. At present it appears that the rate prayed for in this form would be bad, and therefore we cannot enforce it by mandamus.

1810.

The KING against The Chapelwardens of BRADFORD.

Per Curiam, Rule discharged.

The KING *against* The Mayor of ST. ALBAN'S.

Thursday, July 5th.

THE *Attorney-General* upon a former day applied for a mandamus to the mayor of *St. Alban*'s to swear in (*a*) *Charles Wetherell* Esq. into the office of deputy-recorder

The borough of *St. Alban*'s having first received a recorder by a charter of *Charles* 1. a subsequent charter of *Charles* 2., after nominating *J. S.* to be the first and modern recorder under that charter, declared that it should be lawful *pro præfato* J. S *modo recordatori* to nominate a sufficient person *fore et esse deputatum* SUUM *in officio recordatoris*; et quod *hujusmodi* deputatus sic factus, &c. habeat et habebit as ample power in the absence of the recorder *aforesaid*, as the *recorder for the time being*, by virtue of those or any former letters patent habet aut habere et exercere *possit* et debet: held that this did not extend the power of appointing a deputy to the successors of *J. S.* in the office of recorder, and that this, which was the plain meaning of the words of the clause, was confirmed by another clause, "Quod *recordator pro tempore existens in perpetuum* sit et erit justiciarius pacis; and by another clause, whereby power is given to *T. Richards* the town clerk, *et cuilibet communi clerico successori* to appoint a deputy with the approbation of the mayor and aldermen: and also by the fact that no deputy had been appointed by any succeeding recorder after the first named, until a recent instance, before the present appointment: though this nonuser was attempted to be accounted for by shewing a by-law (admitted, however, to be bad) passed not long after the charter of *Charles* 2. by which the recorder's appointment of a deputy was subjected to the approbation of the mayor and aldermen.

(*a*) It was observed by the Court, upon the motion for the mandamus, that as the deputy recorder was not a member of the corporation, but was merely to act for the recorder, the rule for the mandamus should be drawn up in this form, and not to *admit* and swear him in.

1810.

The King against The Mayor of St. Alban's.

of the borough, upon the appointment of *Perceval Lewis* Esq. the present recorder. *St. Alban*'s is an ancient borough, incorporated under charters of *Ed.6.* and *Charles* 1. and there formerly existed under that of *Ed.* 6. a weekly court of record held before the steward; but *Charles* 1. gave a recorder to the corporation. Then *Charles* 2., by his charter of the 27th of *July* 1664, upon which the question arose, new-modelled the corporation, and after nominating *John Simpson* to be the first and modern recorder under that charter, proceeded to give the power of appointing a deputy in these words:—

" Et ulterius volumus, et per presentes declaramus, quod bene liceat et licebit *ad et pro prædicto Johanne Simpson moderno recordatore burgi prædicti* constituere nominare et facere aliquem alium sufficientem et discretum virum in legibus Angliæ eruditum *fore et esse deputatum suum in officio recordatoris burgi illius;* et quod hujusmodi deputatus sacrum suum corporale, coram majore burgi prædicti *pro tempore existente*, ad officium et locum illum bene et fideliter in omnibus juxta debitum officii et loci illius exequendum præstabit, in talibus modo et formâ qualibus recordator ejusdem burgi sacrum suum præstare debet et tenetur. Et quod *hujusmodi* deputatus, sic factus nominatus et juratus, habeat et habebit tam plenam potestatem et authoritatem, in absentiâ recordatoris prædicti, in omnibus et singulis officio *recordatoris illius* sive pertinentibus ad omnes intentiones et proposita *quam recordator burgi illius pro tempore existens*, virtute præsentium seu aliquarum aliarum literarum patentium aliquorum progenitorum nostrorum in hac parte factorum, habet aut habere et exercere *possit* et debet. Et ulterius damus et concedimus majori burgi prædicti pro tempore existenti plenam potestatem et authoritatem ad sacrum prædictum hujusmodi

deputato

1810.

The KING *against* The MAYOR of ST. ALBAN'S.

deputato dandum et preſtandum per preſentes. Volumus etiam quod *recordator* burgi prædicti *pro tempore exiſtens in perpetuum* ſit et erit juſticiarius pacis et de le *quorum* hæredibus et ſucceſſoribus noſtris, infra dictum burgum et limites ejuſdem, ad omnia facienda et exequenda quæ ad officium juſticiarii pacis et de le *quorum* pertinent ſeu quoviſmodo ſpectant: quodque talis et hujuſmodi recordator, antequam ad officium ſuum exequendum admittatur, ſacrum ſuum ſic ut præfertur coram majore burgi prædicti pro tempore exiſtente prius præſtabit." The following parts of the ſame charter were alſo referred to in the argument.

" Aſſignavimus, conſtituimus, &c. *T. Richards* fore et eſſe primum et modernum communem clericum burgi illius, continuendum in eodem officio durante bene placito dictorum majoris et aldermannorum, ad faciendum et ſcribendum, &c. Volumus etiam quod bene licebit eidem *T. Richards et cuilibet communi clerico ſucceſſori* officium illud per ſe vel per ſufficientem deputatum ſuum exercere, quoties cauſa impotentiæ et alia cauſa legitima ad officium illud exequendum ipſi vacare non ſufficit, per majorem et aldermannos burgi prædicti pro tempore exiſtentibus vel majorem partem eorundem approbandum." And at the end of the charter is the following clauſe: " Et ulterius volumus, &c. quod major, aldermanni, capitalis ſeneſcallus, recordator, communis clericus, et omnes alii officiarii et miniſtri noſtri burgi prædicti, *et eorum deputati*, necnon omnes juſticiarii ad pacem noſtram hæredum et ſucceſſorum noſtrorum, &c. antequam ad executionem ſive exercitum officii, &c. ſhall take the oaths of allegiance.

It appeared by the affidavits that Mr. *Simpſon*, in the courſe of his recorderſhip, appointed two deputies, the

 firſt

1810.
The KING against The Mayor of ST. ALBAN'S.

first of which was in 1672; but that he acted the greatest part of his time in person. That in 1667 certain by-laws were made by the corporation recognizing the right of the recorder for the time being to appoint a deputy, but stipulating that he should appoint such deputy as the mayor and aldermen should approve of; whose approbation was not required by the charter. That in the reign of *James* 2. when Mr. *Farringdon*, the immediate successor of Mr. *Simpson*, was recorder, a petition was presented to the crown for another charter with certain amendments, one of which was that the recorder might have power to appoint a deputy; but before that charter was perfected, the king withdrew from the realm. It did not appear that any other deputy recorder was appointed till 1782, when one was appointed upon the nomination of the present recorder; but that deputy acted only for a short time, and then resigned. The question now made was, whether the power of appointing a deputy was by the charter of *Charles* 2. confined to Mr. *Simpson*, the first recorder, or whether it extended also to his successors in the office?

Dampier and *Copley* now shewed cause against the rule for a mandamus, and insisted that the power of appointing a deputy was confined by the words of the charter (on which they commented at large) to Mr. *Simpson*, and could not be extended by implication to his successors. The power was given to him by name to appoint a sufficient person to be *his* deputy. There might have been special reasons for confiding such a power to him, which might not ordinarily extend to his successors. The corporation might be satisfied from their personal knowledge of him that he would not put a deputy upon them who was not agreeable to them. As to the construction put upon the statute

tute de circumspecte agatis (*a*), which, though naming only the bishop of *Norwich*, has been held to extend to all bishops; that was a remedial statute and was therefore to be liberally expounded: but the office of recorder is judicial, and it is against the policy of the law that such an office should be executed by deputy without an express warrant given to the principal to make such an appointment. They relied particularly on the word *posset*, which was only correct as applied to the then existing recorder; but if meant to be applied to any future recorder the word would have been *possit*, and that was the word applied throughout the charter to any future officer. They also laid stress on a prospective clause, which required the court to be holden before the mayor and recorder, or in their absence before the two senior aldermen, not mentioning the deputy recorder, as it would have done if the framers of the charter had looked to the existence of such an officer; the deputy of the first recorder having the same power as the recorder himself.

The Attorney-General, *Lens* Serjt., *Warren*, and *Nolan*, contrà, argued that the power was so intimately connected with the office, and so little with the particular person who should happen to fill it, that the fair presumption was that it was intended to be annexed to the office and not to the individual officer who first held it; and the Court would therefore adopt that construction if by possibility the words of the charter would bear it. The crown must have intended that the inhabitants of the borough should be at all times governed in the same manner; otherwise it would be a power given to *John Simp-*

(*a*) 13 *Ed.* 1. Vide 2 *Inst* 487

1810.

The King against The Mayor of St. Alban's.

son, and not to the recorder as one of the corporation; nor for the benefit of the inhabitants. The deputy is to have as full power and authority, in the absence of the recorder, as *the recorder for the time being*, by that or any former charter: that refers to every future recorder: the words are "habeat *et habebit* tam plenam potestatem," &c., and as all recorders were to have the same powers, it was nugatory to say that the deputy should have the same powers as *any* recorder would have: the words habeat *et habebit*, &c. give the deputy for the time being whatever power the recorder for the time being would have. They also referred to the words appointing the recorder for the time being a justice of the peace, and argued that the appointment of the deputy was given in similar terms. *Prædictus recordator* does not mean *John Simpson* but the modern recorder beforesaid: if the reference had been meant to apply only to the individual, it would not have stated merely his name of office. [Lord *Ellenborough* C. J. *Prædictus* having been before applied to *John Simpson* the modern recorder; when in the same sentence *prædictus recordator* is used, must it not be understood that the whole description is to be brought down, and then it means not merely the *aforesaid recorder*, but the *aforesaid recorder* John Simpson.] Instead of "et quod *hujusmodi* deputatus," &c. the language should have been deputatus ejusdem *Johannis Simpson*, or hujus, or illius, if it had been meant to confine the deputation to him alone: *hujusmodi* applies rather to the nature of the office: and if *recordatori illius* in the same sentence meant *John Simpson*, the words *pro tempore existens*, which soon after follow, could not with any propriety be applied to him. Then if *posset* is to be relied upon, how does that accord with *debet?* The word *moderno* does not mean the same as primo, but

but only the modern recorder under that charter; and it is the fame as if it had faid that it fhould be lawful for the recorder created by this charter, who is now *John Simpfon*, to make a deputy: and when *recordatoris* is immediately after mentioned, it is without any term of reference to *John Simpfon*; and therefore when it recurs again with the adjunct *prædicti*, it muft refer to the officer, the recordator, who is before mentioned alone, without reference to *John Simpfon*. They referred to the Earl of *Shrewfbury*'s cafe (*a*). And laftly they argued that if the words were even ambiguous, the reafon of the thing ought to decide the conftruction in favor of the officer, as recorder: and that this conftruction was ftrengthened by the cotemporaneous ufage, and by the evidence of the by-law; though that was bad in attempting, as it did, to fetter the power of the recorder by requiring the approbation of the mayor and aldermen: and the exiftence of that by-law, which made it doubtful whether fuch approbation were neceffary, fufficiently accounted for the non-ufer of the power by the intermediate recorders.

Lord ELLENBOROUGH C. J. We are called upon to put a conftruction upon the charter of *Charles* 2., and the queftion is whether the power of appointing a deputy were by that charter confined to *John Simpfon* alone, the firft modern recorder under it, or whether the fame power extend to all future recorders? It is material to confider how the corporation was conftituted in this refpect before that charter. The recorder was a branch of the ancient office of fteward, and had branched off in the name of recorder under the charter of *Charles* 1., by the terms of which the recorder was to execute the

(*a*) 9 *Rep.* 46. *b.*

duties

1810.

The King *against* The Mayor of St. Alban's.

duties of his office in perfon. If that duty were to be relaxed upon the application for the new charter in the time of *Charles* 2., we muft look for the alteration in the precife words of that charter, and we fhall look at them with jealoufy: we fhall alfo compare them with the other parts of the fame charter in which a power of appointing a deputy is given to the town clerk; and we find that thofe who drew the charter were well aware of the proper general words to be ufed in giving a general power to the officer for the time being to appoint a deputy, when fuch a general power was intended to be given. The words of that claufe are "volumus etiam quod bene liceb't eidem *T. Richards et cuilibet communi clerico fucceffori,*" &c. to execute the office by himfelf or his deputy, &c.; but fuch deputy is to be approved by the mayor and aldermen for the time being or the major part of them. Now that claufe names not only *T. Richards*, the then town clerk, but all his fucceffors; and compare the terms of it with the words in which the power in queftion is given; and if there be no real doubt or ambiguity in them, I fhould be loth to refer to an extreme cafe of perfonal favor for their conftruction, when the crown has fpoken plainly for extending the fame power of appointing a deputy to all future recorders. Now the power is in terms given to *John Simpfon*, perfonally named, and called the *modern* recorder of the borough: and that cannot by any conftruction refer to all future recorders, but it is a natural defcription of the perfon, and by his particular defignation of *modern* recorder: and he is to make a fufficient perfon "*fore* et *effe* deputatum *fuum*," &c. Then it proceeds, "et quod *hujufmodi* deputatus" fhould take his oath; deputy of whom? of *John Simpfon* the modern recorder: no

other

other kind of deputy is mentioned before: such deputy then is to take his oath before the mayor *for the time being*: these latter words are relied on as looking prospectively to all future mayors; but *John Simpson* might live for many years, while the mayor would be changed every year; therefore the words of succession are there properly introduced as applied to the office of mayor before whom the oath was to be taken. Then the deputy is to take his oath in such mode and form as recordator ejusdem burgi ought to do. Then follow the words which have been principally relied on in the sentence beginning: " et quod hujusmodi deputatus sic factus, &c.; (that is, by *John Simpson*; for no recorder in general is before mentioned;) shall have as ample power in the absence " recordatoris *prædicti* (that is of *John Simpson* the modern recorder; and if, instead of the words of reference, the term referred to be introduced, the sense will be quite clear;) to all intents and purposes as the recorder *for the time being* (which are the words principally relied on) by virtue of that or any former letters patent has or may and ought to have and exercise. That is a reference to the functions of the recorder, that is, of the modern recorder *John Simpson*, or any of his predecessors. Full power is then given to the mayor for the time being to administer the oath hujusmodi deputato: but no other deputy was predicated than the deputy of *John Simpson*. Then follow words which throw a strong light upon the preceding clauses; for after having done with the particular recorder *John Simpson*, the charter proceeds to specify the general power of every recorder, by providing " quod recordator burgi prædicti *pro tempore existens*," and then it uses the words " *in perpetuum* sit et erit (which are put in contrast with the *modernus*

recordator

1810.

The King *against* The Mayor of St. Alban's.

recordator before named,) justiciarius pacis," &c. But if any doubt could be made whether the words which have been commented upon had been accidentally used, there is in the same charter another clause giving power to the then town clerk *Thomas Richards*, and to every succeeding town clerk, to appoint a deputy; but then such deputy is to have the approbation of the mayor and aldermen. No such approbation is required for the recorder's deputy; which shews that the crown conferred the power of appointment on *John Simpson* from conviction of his personal fitness to judge of the sufficiency of his deputy. I do not bring in aid any materials of construction from the subsequent charter irregularly prepared in the time of *James* 2., nor from the opinions of any recorder as to the meaning of the charter of *Charles* 2.: but I cannot refrain from observing that in fact no appointment of a deputy has been made by any other than the first recorder down to the year 1782, when the present recorder named a deputy who acted for a short time: and that is the only extrinsic circumstance I would refer to in aid of the construction of the charter; which, however, I think, requires no such aid upon the present question.

Grose J. The question is whether the power of appointing a deputy were given to *John Simpson* alone, the modern recorder named in the charter, or were meant to be extended to his successors in the same office. It is said that there could be no reason for giving such a power to him in particular: but looking attentively at the words of the charter, it appears to be given to him by name, describing him also as the *modern* recorder. Then looking to other parts of the charter, we find that where the

power

power of appointing a deputy was meant to be given generally, as in the inſtance of the town clerk, it is given to him and each of his ſucceſſors. That is an argument which I confeſs I am not prepared to anſwer; and therefore I feel inclined to adopt my Lord's conſtruction of the charter. And though I cannot aſſign any ſatisfactory reaſon why the power ſhould have been confined to the firſt recorder under that charter, yet it is ſafer to abide by what we find expreſſed in the charter than to proceed upon conjecture of what might more probably have been intended; eſpecially where the other conſtruction has never been adopted in practice till a very recent inſtance. I therefore agree that the mandamus ought not to go.

LE BLANC J. If the words of the charter appear to us to be plain, we ought not to look to what we might conſider as the motive which ſhould have governed the crown. What were the motives for giving this power to the then recorder only, we cannot now conjecture; but if we collect from the words that the crown did ſo intend, we muſt give effect to that intention ſo expreſſed. Now it appears that when the crown meant to give a power of appointing a deputy generally, it has given it to the then town clerk and all future town clerks in expreſs words. But when power is given to the recorder to appoint a deputy, it is not given to the recorder generally, but the crown declares that it may and ſhall be lawful "*pro prædicto* Johanne Simpſon, *moderno recordatore*" to make a ſufficient perſon "deputatum *ſuum*" in the office of recorder. It is argued that this is to be underſtood as a grant of the power to the modern office of recorder then filled by *John Simpſon*, as if his name had been introduced

1810.

The KING against The Mayor of ST. ALBAN'S.

troduced merely by way of instance, and not as one to whom the power was given personally. But when we find that in every other part of the charter where the crown meant to give a power generally to be exercised by the officer for the time being, it is so expressed, we cannot suppose that the like words would have been omitted in this part, if the power in question had been intended to be given generally. An argument has also been raised upon the words of the clause giving power to the *mayor for the time being* to administer an oath to the deputy so appointed; but that was at all events necessary, the mayor being an annual officer. It is also relied on, "quod *hujusmodi* deputatus," so made, nominated, and sworn, shall, in the absence of the recorder aforesaid, have the same power in all things "quam recordator burgi illius *pro tempore existens*," &c.: by which, it is said, must be understood that the *deputy for the time* being was to have the same power as the *recorder for the time being*. But I do not know how else it could be properly described: it could not properly have said that the deputy should have the same power as was before given to *John Simpson*; for he was to exercise all the powers which had been before given to the office of recorder by virtue of any former letters patent as well as by that charter. It appears therefore upon an attentive examination of the charter, that the original clause conferring the power in question does not contain any ambiguity which should lead us to pick out the meaning of the crown from other parts of the same charter; though as far at we can collect its meaning from other parts, it falls in with the natural meaning of the words used in that clause; and that those expressions which have been relied on as warranting a more extended construction of the power may all be explained: there

there is therefore no such doubt upon the meaning of the charter as should induce the Court to grant the writ for the purpose of putting the defendant to make a special return.

1810.
The King against The Mayor of St. Alban's.

Bayley J. The true construction of the charter is that the right of appointing a deputy was meant to be confined to *John Simpson* the modern recorder under the charter, and not to be extended to his successors. There might be motives weighing with the crown for conferring such a special power: he had been recorder for some time, had been tried and approved, and reliance might be placed on his personal judgment and discretion in the exercise of such a power: he was appointed by the crown under the new charter; but future recorders would be appointed by the corporation, and the crown might not intend to give future recorders the same power of putting a deputy upon the corporation whom they might not approve. And in fact since the death of *John Simpson* there has been no deputy recorder appointed till the time of the present recorder. It is not necessary that there should be a power of appointing a deputy for such an office; and if the crown had meant to give the power generally, it would not have used the special and restrictive words which it has done in the clause conferring it. It is also to be remarked that there are two other clauses in the charter giving powers to officers in general terms which extend to their successors; which would naturally have led the crown to have used the same general words in this clause if it had meant to extend the power in like manner. One of them is that which makes it lawful for *Thomas Richards* the town clerk, and for *every succeeding town clerk* to appoint a deputy with the approbation of the

mayor

1810.

The King against The Mayor of St. Alban's.

mayor and aldermen: the other is, where power is given to the recorder *for the time being for ever after* to be a justice of the peace, which extends to all future recorders. The change of phrase in these instances from that used in the clause in question shews a change of intention in the giver of the power: and therefore, without further criticising and commenting upon the words of the clause, I agree with the Court upon the general construction of it.

Rule discharged.

Thursday, July 5th.

The King *against* The Justices of Staffordshire.

No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under the stat. 6 *G.* 3. *c.* 25 for absenting himself from his master's service, the clause of appeal in that statute excepting *an order of commitment*, and the order of commitment in question containing a conviction of the collier for an offence within the act.

A Mandamus was applied for, commanding the defendants to cause continuances to be entered upon the appeal of *Joseph Thompson* against a record of conviction of him as a hired servant to *E. Sheldon* for having absented himself from the service of his master, without his consent, down to the next general quarter sessions to be holden for the county of *Stafford*, and at such sessions to hear and determine the matter of such appeal. The affidavits set out the instrument itself at large, viz. "County of *Stafford*—To the constables, &c. and to the "keeper of the house of correction at *Stafford* in and for "the said county—Whereas *Joseph Thompson*, a hired "servant to *E. S.* of the parish of *Tipton* in the said "county, *collier*, is this day brought before us, two of "his majesty's justices of the peace for the said county, "and is lawfully *convicted*, as well by the oath of the "said *E. S.* as otherwise, of being his lawful hired servant, and of having absented himself from his service "in the said parish of *T.* &c. without his consent, before

"the

1810.

The King against The Justices of Staffordshire.

"the expiration of the term of his contract to serve—
"These are therefore in his majesty's name to charge
"and command you the said constable to take and con-
"vey the said *J. T.* to the house of correction aforesaid,
"and deliver him to the keeper; and you the said keeper
"to receive the said *J. T.* into your custody, and safely
"him there keep two months from the date hereof.
"Given under our hands and seals this 29th of *January*
"1810." (Signed and sealed.) That *Thompson* immediately upon or soon after such conviction, and before he was conveyed to the house of correction under that warrant, gave notice in writing to *Sheldon*, and also to the convicting magistrates, of his intention to appeal to the next sessions against such conviction, and offered to enter into a recognizance before one of the same magistrates with sufficient surety conditioned as in the statute is directed; which was refused. That notices were again given to the magistrates and the prosecutor on the 23d of *April* last, more than six days before the sessions, that *Thompson* would appeal against the conviction; and he also entered into a recognizance before another magistrate to appear at and abide the order, &c. of the Court. That he entered his appeal at the sessions on the 3d of *May*, and proved his notice of appeal and recognizance; but when the appeal was called on, the clerk of the peace informed the Court that no conviction, order, or determination of the magistrates against *Thompson* had been returned to the sessions; for which cause and no other the appeal was dismissed without trial.

Jervis and *Petit* opposed the rule, contending that the warrant of commitment of the 29th of *January* 1810 was a commitment in execution under the stat. 6 *Geo.* 3. *c.* 25.

 This

1810.

The King *against* The Justices of STAFFORDSHIRE.

This ſtatute was paſſed in extenſion of the ſtat. 20 *Geo. 2. c.* 19. in pari materiâ; and the 4th ſect. provides that if any artificer, *collier*, &c. ſhall contract to work with any perſon for any time, and ſhall abſent himſelf from his ſervice before the term of his contract ſhall be completed, or be guilty of any other miſdemeanor, any juſtice of the peace of the county or place, on complaint made upon oath by the maſter, &c. may iſſue his warrant for the apprehenſion of ſuch collier, &c. and examine the complaint; and if it ſhall appear to the juſtice that ſuch collier, &c. ſhall not have fulfilled his contract, or hath been guilty of any miſdemeanor, it ſhall be lawful for the juſtices *to commit* him to the houſe of correction for any time not exceeding three months, nor leſs than one. By *ſ.* 2. of the former act the impriſonment was confined to one month. And by *ſ.* 5. of both acts the appeal, which is given in other caſes within the two acts, is denied in this caſe: for it provides, "that if any perſon "ſhall think himſelf aggrieved by ſuch determination, "order, or warrant of any juſtice of the peace as afore-"ſaid, *except an order of commitment*, every ſuch perſon "may appeal to the next general ſeſſions, &c. giving ſix "days' notice &c. and entering into a recognizance "within three days after ſuch notice, &c. with ſufficient "ſurety conditioned to try his appeal," &c. This then muſt be taken to be an *order of commitment* within the meaning of the act, excepting it out of the clauſe giving the appeal; which clauſe will ſtill operate upon other caſes within the two acts; ſuch as orders for compoſing differences and reſpecting wages between the maſters and ſervants there named, and for determining the amount of ſatiſfaction for loſs of ſervice. It is a conviction and an order of commitment of the offender in the ſame inſtrument:

1810.

The KING *against* The Justices of STAFFORDSHIRE.

ſtrument: it is not therefore open to the objection taken in *The King* v. *Rhodes* (*a*), where the defendant was committed in execution under the vagrant act (*b*), without any previous conviction for the offence. And though it was ſaid by *Buller* J. in *The King* v. *Eaton* (*c*), that juſtices of peace ought in every inſtance to return a conviction to the ſeſſions, whether an appeal be or be not given; yet the reaſon aſſigned was that the crown might not be deprived of its ſhare of the forfeiture; which does not apply to a caſe of this ſort. But ſuppoſing the Court were of opinion that there ought to have been a ſeparate conviction returned to the ſeſſions, againſt which the party might have appealed, and that the appeal is only reſtrained in the caſe of a ſimple order of commitment in execution, as diſtinct from ſuch conviction; yet the two months' impriſonment having long ſince expired, the court would not now do a nugatory act, by granting a mandamus to the ſeſſions to receive and enter continuences on an appeal, from which no effect could enſue.

Gaſelee, contrà, contended that the *conviction* and the *commitment in execution* were two diſtinct things in their nature, and could not in legal contemplation be united, by being blended together in the ſame inſtrument: and that the latter only being excepted out of the appeal clauſe by the deſignation of an *order of commitment*, an appeal lay againſt the *conviction*, under the general terms of the 5th clauſe, "that if any perſon ſhall think himſelf aggrieved by ſuch *determination*, *order*, or *warrant* of any juſtice of the peace, (except an order of commitment,)

(*a*) 4 *Term Rep* 220. and vide *Rex* v. *Cooper*, 6 *Term Rep* 509. And *Maſſey* v *Johnſon*, *ante*, 67.
(*b*) 17 G. 2. c 5. (*c*) 2 *Term Rep*. 285.

1810.

The King *against* The Justices of Staffordshire.

ment,) he may appeal," &c. If this claufe do not extend to convictions under the 4th claufe, there will be little elfe for it to operate upon in the ftatute; for the only other power to be executed by juftices of the peace is under the firft claufe; where an apprentice fhall abfent himfelf from his mafter's fervice, and fhall refufe to ferve him for a further time in proportion to the lofs of fervice during the contract, or to make compenfation to his mafter for it; in which cafe a juftice of peace, on complaint of the mafter, may determine what fatisfaction fhall be made to the mafter, and may commit the apprentice to the houfe of correction not exceeding three months, if he do not give fecurity to make fuch fatisfaction. [*Bayley* J. The appeal claufe will operate upon the determination or order of the juftice as to the amount of the fatisfaction to be paid to the mafter by the apprentice under the latter act, if he do not ferve out his loft time.] It is difficult to fuppofe that the legiflature meant to give an appeal againft an order for a further fervice of perhaps 24 hours, or for the payment of a few fhillings in fatisfaction of the lofs of fervice, and yet to deny it in the cafe of a conviction to be followed up by three months' imprifonment. [Lord *Ellenborough* C. J. To what elfe than this order of commitment can the words of exception in the appeal claufe apply? *Le Blanc* J. This is a conviction and a warrant of commitment in execution at the fame time: the act does not feparate them; and to give the exception in the appeal claufe any effect it muft operate on both. Under the vagrant act the conviction and commitment are always in the fame inftrument.] There muft be a conviction before there can be a commitment. [*Bayley* J. There muft be a conviction in the warrant of commitment. The objection in *The King* v. *Rhodes* was, that the

warrant

1810.

The King *against* The Justices of Staffordshire.

warrant of commitment did not include a conviction: it only stated that he was *charged* before the justice with being a rogue and vagabond; and it did not proceed, as it ought to have done, to adjudge the defendant to be guilty of the offence charged.] Unlefs the appeal lies in this cafe, to get rid of the conviction, although the period of imprifonment has expired, the party grieved is without redrefs; for fo long as the conviction remains in force, it will be an anfwer to any action of trefpafs.

Lord Ellenborough C. J. It is not for us to fay whether it may be convenient and proper to provide a remedy by appeal for a party grieved by a commitment in execution under this act: we can only declare what the legiflature have faid in this cafe: and when by excepting an order of commitment out of the appeal claufe, they have faid that there fhall be no appeal againft fuch an order, and when the commitment muft for this purpofe be taken to be one and the fame thing with the conviction, we have no difcretion left to exercife upon the fubject: and it does not become us to fcan the wifdom of the provifion which the legiflature have enacted.

Per Curiam, Rule difcharged.

1810.

Friday, July 6th.

The plaintiffs having contracted by charter-party sealed to let a ship, then in the *Thames*, to freight to the defendants for eight months, *to commence from the day of her sailing from Gravesend* on the voyage there stated, and having covenanted that the ship should sail from the *Thames* to any British *port in the English channel*, there to load such goods as the freighters should order, and sail to the *West Indies*, and bring back a return-cargo to *London*, afterwards agreed by parol with the defendants that the ship, instead of loading at some port in the channel, should load *in the Thames*, and that the freight should commence *from her entry outwards at the custom-house*: held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit.

WHITE and Others *against* PARKIN and Others.

THE plaintiffs, as owners, brought assumpsit against the defendants as freighters of a ship, and the declaration contained a special count, stating the charter-party of affreightment after mentioned; and that the defendants, in consideration of the plaintiffs permitting the ship to take in her goods in the *Thames*, instead of her loading at a port in the *English* channel, promised to pay for such use of the ship, after the rate in the charter-party mentioned; and that the pay should commence and be accounted from the day the ship should be entered outwards at the custom-house. There were also general counts for the use and detention of the ship. At the trial in *London* before Lord *Ellenborough* C. J. a verdict was taken for the plaintiffs for 397*l.* 16*s.* 8*d.* subject to the opinion of the Court upon the following case.

By charter-party of affreightment, under seal made the 15th of *November* 1808 the plaintiffs, as owners of the ship *Sir Sidney Smith*, then lying in the *West India* docks, let her to freight to the defendants by the month for 8 calendar months, *to begin and be accounted from the day of the ship's sailing from* Gravesend *on the voyage aftermentioned*, and for such further time as might be necessary to complete the same, upon these terms. The owners covenanted with the freighters that the ship should with the first opportunity of wind and weather sail from the *Thames*, and proceed direct, agreeably to the instructions of the freighter, *to any one* British *port in the* English *chan-*

nel, and on her arrival there should be made tight and strong, and in every respect seaworthy, and be manned, armed, and equipped as therein mentioned, &c.; and should thereupon take on board at such her ordered port all such lawful goods as the freighters should tender, &c., and sail therewith from her loading port, and proceed direct to *Barbadoes* for orders, whether to unload at *Hayti* or *Martinique*, &c. and take in a return cargo, and return therewith direct back to the port of *London*, and there make a true delivery of the cargo to the freighters. In consideration whereof the freighters covenanted to provide the king's licence and other necessary documents for the voyage, and to load the ship at a *British* port in the *English* channel, and to dispatch her to *Barbadoes*, &c. and to unload the outward and bring the homeward cargo at and to the places and in the manner described, and also to pay to the owners for freight *during the said voyage and employ* at the rate of 40*s*. per ton of the ship's register tonnage, per calendar month, for 8 calendar months certain, *to begin and be accounted from the day of her sailing from* Gravesend *in the outward voyage*, and at the like rate for such further time as the ship should be continued in the service and employ of the freighters, until the final discharge of her homeward cargo at the port of *London*.

After the execution of the charter-party, upon the application of the defendants, it was agreed between them and the plaintiffs, that the ship, instead of loading at some port in the channel, should take in her cargo in the *Thames*, and that the pay of the ship should commence from the time of her being entered outwards at the custom house. The charter-party however was not waved, but was to stand in all other respects. In consequence of this agreement the ship took in a cargo in

1810.

WHITE *against* PARKIN.

the *Thames*, was entered outwards at the custom-house on the 30th *November*, and sailed from *Gravesand* on the 27th of *January* 1809, and went to *Falmouth*, where she took in some pilchards. She afterwards proceeded to *St. Domingo*, (*Hayti*,) delivered her outward cargo to the orders of the defendants, took in a return cargo on their account, and returned back to *London*. All the freight due according to the charter-party, computed from the vessel's departure from *Gravesend*, has been paid: the sum for which this action is brought is the additional sum for the pay, computed from the entry outwards at the custom-house, according to the agreement above-mentioned for the ship's loading and detention in the *Thames*. The question was, whether the plaintiffs were entitled to recover it? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Taddy, for the plaintiffs, said that as there was a good consideration for the promise laid in the declaration, the plaintiff would be entitled to recover in this action the additional freight for the hire and use of the ship from her loading and entry outwards in the *Thames* until her departure from *Gravesend*, from which time she proceeded under the charter-party, unless that deed stood in the way. But he contended that the new promise would support this action either as a substitution in lieu of the original contract contained in the deed, or as an addition to it. It has been settled since *Blake*'s case (a) that accord and satisfaction is a good plea in every case of a specialty where damages only are to be recovered for a wrong or default subsequent to the deed, though not where a sum certain is due upon the face of the deed.

(a) 6 *Rep.* 44.

Now

Now here, after the ship has been loaded by the freighter in the *Thames*, under the new agreement, of which he has derived the benefit, he cannot object that she was not loaded in the channel; though the agreement to load in the river could not have been pleaded in bar of an action on the specialty; for after the parol contract has been carried into effect, a new cause of action arises, and the rights of the parties under the specialty are varied, not by the parol agreement to vary them, but by what has been done and accepted between the parties. In the case of *Hotham* v. *The East India Company* (*a*), it was doubted whether facts of this kind could be set up in defence by way of plea to an action of covenant on the charter-party, and therefore the questions between the parties were tried in feigned issues: but Lord *Mansfield* said, "he had no doubt but that if the delivery of the cargo at *Margate* was in the contemplation of the parties substituted for a delivery at *London*, it might have been averred in an action of covenant." And *Buller* J. said, "there could be no doubt on the subject of the first issue, if the parties had gone on in the usual way by an action of covenant on the charter-party. If an act undertaken to be done be dispensed with by the other party, it is sufficient so to state it on the record." But, 2dly, at any rate this new contract may be superinduced upon the other: [Lord *Ellenborough* C. J. that is, if it do not contradict the terms of the specialty contract.] There can be no contradiction between them, inasmuch as the parol contract is for an antecedent period to the other; and there could have been no remedy on the specialty for the use and detention of the ship up to the period of her departure from *Gravesend*. He referred to *Fenner* v.

(*a*) *Dougl.* 272.

Mears,

1810.

WHITE *against* PARKIN.

Mears (*a*), where the aſſignee of a reſpondentia bond recovered in an action of indebitatûs aſſumpſit againſt the obligor, upon a collateral promiſe made by ſuch obligor by an indorſement upon the bond, engaging to pay the amount to any aſſignee of the obligee; no action being maintainable on the bond itſelf by the aſſignee in his own name. [*Bayley* J. obſerved that that caſe had ſince been doubted (*b*).] In *Foſter* v. *Allanſon* (*c*), where articles of partnerſhip under ſeal were entered into between the parties, containing a covenant to account yearly and make a final ſettlement at the end of the partnerſhip; and on the diſſolution of it, they accounted, and ſtruck a balance, which was in favour of the plaintiff, including items not connected with the partnerſhip, which the defendant promiſed to pay; the Court held that aſſumpſit lay on ſuch promiſe: and *Buller* J. ſaid that it would have been the ſame though ſuch account had not included any other than partnerſhip items.

Scarlett contrà. If this could be conſidered as a new contract ſubſtituted in place for that under ſeal, it would ſhew that the plaintiff might have ſued on the ſpecialty for the breach of it; but that could not be, there being no covenant in it for the additional freight: and the doctrine of accord and ſatisfaction cannot apply; for that can only be a good plea after the covenant is broken. Nor does the principle of waver apply; for as in caſe of a forfeiture, though the party injured may wave the forfeiture, he does not wave the covenant itſelf. Then the queſtion is, whether where parties have contracted under ſeal for the uſe of a certain thing, they can by parol ſuper-

(*a*) 2 *Blac. Rep.* 1269.
(*b*) This was by Lord *Kenyon* C. J. in *Johnſon* v. *Collins*, 1 *Eaſt*, 104.
(*c*) 2 *Term Rep.* 479—482.

add

add other terms and conditions to the covenant. And when it is faid that this agreement is confiftent with the charter-party, the diftinction is more in words than in effect; for the fame thing may be faid in every cafe where a new term is introduced by parol into a fealed contract, which before was filent upon the fubject. [Lord *Ellenborough* C. J. The parol agreement was for the ufe of the fhip for a different period of time from that in which the charter-party attached. Until the period covenanted for arrived, might not the plaintiff have let his fhip out to any other perfon; and if fo, why not to the defendants? It is only by blending in the fpecial count the two contracts, that any difficulty appears to arife; for if the cafe had ftood upon the common count for the ufe and hire of the fhip for the antecedent period before her arrival at *Gravefend*, no anfwer could have been given to it on account of the exiftence of a charter-party, which did not attach till her departure from thence.] The antecedent contract went to affect the execution in part of the contract under the charter-party, by which latter the fhip was to proceed to fome port in the *Englifh* channel, and there take in her loading: fhe therefore failed as upon a different voyage under the new contract. He then cited a cafe of *Leflie* v. *De la Torre*, tried at the fittings after *Trinity* 1795, before Ld. *Kenyon* C. J., where the declaration was in debt upon a charter-party againft the freighter, and alfo contained the common counts in debt. The defendant had chartered the fhip of the plaintiff to carry corn to *Barcelona* in *Spain*, and 65 running days were to be allowed for waiting for convoy *at Portfmouth* and *Ferrol*, and fo much per day was to be paid for demurrage. The defendant, finding that the fhip was likely to wait at *Portfmouth* a long

 time

1810.

White *against* Parkin.

time for convoy, and that the *Spanish* convoy was at *Corunna*, persuaded the master to go to *Corunna* and wait for the convoy there; but in fact after going to *Corunna*, he waited there for the convoy much beyond the 65 running days; and when the action was brought against the defendant for the demurrage, he defended himself upon the letter of the charter-party. The plaintiff on the other hand set up the agreement to substitute *Corunna* for *Portsmouth*. Ld. *Kenyon* objected that there were no specific damages agreed upon for which debt would lie. The plaintiff's counsel then suggested that he was entitled to a verdict on the count for a quantum meruit. But his lordship decided that the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter it.

Lord Ellenborough C. J. Here there is no conflict between the charter-party and the subsequent agreement. It is true that where there is a contract under seal, the parties cannot dispense by parol with the performance of any of the covenants in it. But here the agreement to load the ship in the *Thames*, before she proceeded to *Gravesend*, was for a period before the charter-party attached. Then what objection can there be to give an earlier reward for an earlier inception of the service than that which was covenanted for under the deed. The parol agreement merely borrowed some of the terms of the charter-party by reference to it, but does not contradict or dispense with it. If there had been less ingenuity exerted in framing the special count in the declaration, and the plaintiff had stood upon the common count for the use and hire of the ship at a time anterior to that of

6 the

the charter-party, there would not only have been no repugnance, but not even the appearance of any, between the two contracts. There is however no real repugnance between them, but the two may well subsist together; therefore this action may well be maintained.

GROSE J. The contracts are separate, and one is to operate before the other.

LE BLANC and BAYLEY, Justices, assented.

Postea to the Plaintiffs.

BRACKENBURY and Others *against* PELL and two Others.

Friday, July 6th.

To an action on a replevin bond, conditioned for the defendant to prosecute his suit below *with effect*, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next county court and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was still depending and undetermined: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same and that the said suit is not still depending*; without shewing how it was determined and ceased to depend.

THE plaintiffs declared, as assignees of the sheriff, in debt upon a replevin bond; which was conditioned to be void if *Pell*, the defendant, appeared at the then next county court, &c. *and there prosecuted with effect* her suit, commenced against the now plaintiffs, for the taking and detaining the goods, &c.: and they averred that afterwards, at the next county court session the 29th of *April* 1807, the defendant, *Pell*, levied her plaint in the said court against the plaintiffs for the taking, &c; but notwithstanding such proceedings, the defendant *Pell did not prosecute her said suit in the said condition, &c. mentioned, according to the tenor, effect, intent, and meaning of the said condition,*

1810.

BRACKENBURY *against* PELL.

condition, but therein failed and made default; whereby the said writing obligatory became forfeited, &c.; and the sheriff afterwards, on the 16th *November* 1807, assigned the same, &c. to the plaintiffs, according to the form of the statute, &c.: and then they alleged non-payment, &c.

Pleas, 1st, that the defendant *Pell* did appear at the next county court holden, &c. next after the making of the said writing obligatory, and *there prosecute her suit which she had there commenced against the now plaintiffs* for the taking, &c. according to the form and effect of the said condition, &c. 2dly, That the defendant *Pell*, after the levying of her aforesaid plaint, did prosecute her said suit in the said condition mentioned, *and which said suit is still depending and undetermined*. The replication to both pleas, admitting that the defendant *Pell* did appear at the next county court, &c. and did there prosecute her said suit as in the first plea mentioned, alleged that afterwards, and whilst the said suit was depending in the said county court, the defendant *Pell did not prosecute her said suit as in the said plea is mentioned, but wholly abandoned the same, and the said suit is not still depending or undetermined*.

To this the defendants demurred; and assigned for special causes, that the replication, so far as it relates to the first plea, admits that the defendant *Pell* performed the condition of the writing obligatory; and does not shew that the said suit was legally determined; or in what manner the defendant *P.* abandoned the same; or that the same was discontinued by her; or that any judgment of non pros, or otherwise, was given therein against her in the county court.

Yates,

Yates was to have supported the demurrer, but the Court desired to hear

Courthope contrà; who abandoned the replication, upon a strong intimation of the opinion of the Court that it could not be maintained, as not shewing how the suit once pending was determined. But he contended that the pleas were bad, inasmuch as they did not shew that the suit had been *prosecuted with effect*, according to the condition of the bond: and that it lay upon the defendants to shew that, in order to get rid of their obligation. If a party undertake to convey an estate, it is not enough to state generally that he has conveyed it, but he must shew by what deed he conveyed it (*a*). If he engage to discharge an obligation, he cannot plead generally that he did discharge it, but he must shew how. So here, it is not sufficient to state that the defendant *Pell* did prosecute her suit and that it is still depending, but the plea should have set forth how far it was prosecuted, or at least that it was prosecuted *with effect*. [*Le Blanc* J. What is prosecuting *with effect*: what else can it mean than that it was prosecuted to judgment? But here it is shewn by the pleas that the suit was prosecuted, but that it is still depending. *Bayley* J. The suit being averred to be still depending, if the plaintiffs recover in this action, the defendants may afterwards recover on the replevin bond.] He referred to *Morgan* v. *Griffith* (*b*), that the plaintiff below must prosecute the suit to a successful decision, otherwise it is no compliance with the condition of the replevin bond: and also to *Lane* v. *Foulk* (*c*), *Dias* v.

(*a*) Vide *Pudsey* v. *Newsam*, *Yelv.* 44. and 5 *Bac. Abr.* 410.
(*b*) 7 *Mod.* 381. (*c*) *Comb.* 228.

Freeman,

1810.

BRACKENBURY *against* PELL.

Freeman (*a*), *Cooper* v. *Prin* (*b*), and 1 *Rol. Abr.* 337. *pl.* 5 & 6. 2 *Bac. Abr.* 485. K. which collects the cases upon recognizances to prosecute writs of error with effect: and 5 *Bac. Abr.* 410, 411. which lays down the rules of pleading and collects the cases, that where covenants are to do a matter of law, performance must be pleaded specially; because, being matter of law, it ought to be exhibited to the Court who are judges of the law, to see if it be well performed, and not to the jury, who are judges of the fact only. And so where the covenants are matters of record, the performance must be shewn specially; because it must appear to be done by the record, and is not to be tried by the jury on the general issue.

Lord ELLENBOROUGH C. J. This is an action on a replevin bond, which is conditioned to prosecute the suit in the sheriff's court with effect; and the breach assigned is that the defendant did not prosecute her suit below according to the tenor and effect of the condition, but therein failed and made default. The defendant pleads that she did appear at the next county court, and did there prosecute her suit according to the form and effect of the condition, and also that that suit is still depending and undetermined. What more had she to allege in order to save the condition of the bond, unless it were shewn in reply that the suit was legally at an end. The general principle of pleading is that where a party relies on a varying state of things from that which has been shewn to have existed on the other side, it is incumbent upon him to shew the variation. Here the suit shewn by the defendant to have

(*a*) 5 *Term Rep.* 195. (*b*) 1 *Sid.* 294.

been

1810.

BRACKENBURY *against* PELL.

been instituted and prosecuted by her, and to be still pending and undetermined; we must presume that things exist in the same state, and that the suit is still continuing, unless the contrary be shewn: it lay therefore upon the plaintiffs to shew that it was legally determined, so as to establish the breach alleged, that it was not prosecuted with effect. The plaintiffs have indeed replied that the defendant did not prosecute but wholly *abandoned* the suit; but I do not know what is meant in legal understanding by *abandoning* a suit: and though it be also added that the suit is not still depending or undetermined; yet the plaintiffs should have shewn how it ceased to depend; and not having done that, the replication is open to the objections stated upon special demurrer.

Per Curiam, Judgment for the Defendants.

Friday, July 6th.

DOE, on the several Demises of the Earl and Countess of CHOLMONDELEY, *against* MAXEY.

Where a testator devised all his real estate, except at *S*, to the head of his family for life, and then to several of the junior branches, in succession, to each for life, with remainder to his first and other sons in tail male, with the ultimate remainder to *his own right heirs*: and then devised his estate at *S* to some, by name, of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised that "for default of such "issue," the estate at *S* should go "to such person and persons, and for such estate and "estates as should *at that time*" (i. e. on the death of the last tenant for life named without issue male) "and from time to time afterwards be entitled to the rest of his real estate "*by virtue of and under his will*." held that the ultimate remainder in fee of the estate at *S*. vested *by descent* in the person who was *the testator's heir at the time of his death*, and did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate.

IN ejectment for a moiety of a certain real estate in the parish of *Swinstead* in the county of *Lincoln*, which was tried before *Bayley* J. at *Lincoln*, a verdict was

1810.

DOE, Lessee of The Earl and Countess of CHOLMONDELEY *against* MAXBY.

taken for the plaintiff, subject to the opinion of the Court on the following case.

The Hon. *Albemarle Bertie* being seised in fee of the several estates hereinafter stated, by his will of the 19th of *October* 1741, duly executed and attested, devised *all* his lands, tenements, and hereditaments in the county of *Lincoln*, to his nephew the Duke of *Ancaster* for life, charged with several annuities; remainder, as to one *moiety*, (*except the estate at* Swinstead) charged with half the annuities, to the testator's nephew Lord *Vere Bertie* for life; remainder (with like charges and exception) to trustees to preserve contingent remainders; remainder to the first and other sons of Lord *Vere* in tail male. And as to the *other moiety*, after the decease of the said Duke (*except his estate at* Swinstead) to his nephew Lord *Montagu Bertie* for life, charged with the other moiety of the annuities; remainder (except *Swinstead*) to trustees, &c.; remainder to the first and other sons of Lord *Montagu* in tail male. And on failure of such issue male of either Ld. *Vere* or Ld. *Montagu*, the testator devised the moiety of him who should first die without issue male, to Lord *Brownlow Bertie* (youngest son of the said Duke) for life, (charged as before); remainder to trustees, &c.; remainder as to the said moiety, charged as aforesaid, to the first and other sons of Ld. *Brownlow* in tail male: but in case of the failure of issue male of both Ld. *Vere* and Ld. *Montagu*, the testator devised the other moiety of the one who should last die without issue male, to Ld. *Brownlow Bertie* for life, (charged as aforesaid); remainder to the trustees, &c.; remainder to the first and other sons of Ld. *Brownlow* in tail male. But in case Ld. *Brownlow Bertie* should die in the lifetime of either Ld. *Vere* or Ld.

Montagu

1810.

Doe Lessee of The Earl and Countess of CHOLMONDELEY, against MAXEY.

Montagu Bertie, and leave no issue male, and only one of them, Ld. *Vere* or Ld. *Montagu*, should have issue male, then the testator devised his *whole* real estate (*except* Swinstead) to such of them, Ld. *Vere* and Ld. *Montagu*, who should have issue male then living, for his life, (charged as before); remainder to trustees, &c.; remainder to the first and other sons of such of them, Ld. *Vere* and Ld. *Montagu*, as should have issue male as aforesaid, in tail male. And on failure of issue male by Ld. *Vere* and Ld. *Montagu* and Ld. *Brownlow Bertie*, he devised *all* his said real estate (*except* Swinstead) charged as aforesaid, to Ld. *Albemarle Bertie*, (second son of the said Duke of *Ancaster*) for life, charged as aforesaid; remainder to trustees, &c.; remainder to the first and other sons of Ld. *Albemarle* in tail male; and for default of such issue then to *Peregrine* Marquis of *Lindsey* (eldest son of the said Duke) for life; remainder to trustees, &c.; remainder to the second son of the body of the Marquis, and to the heirs male of the body of such second son; and for default of such issue to the third and other the younger sons of the body of the Marquis successively in tail male; remainder as to all the premises to *his* (the testator's) *own right heirs for ever*. And the testator devised to Ld. *Albemarle Bertie*, after the death of the said Duke, all his estate, lands, &c. *at Swinstead* for life; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to Ld. *Montagu Bertie* for life, sans waste; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to Ld. *Brownlow Bertie* for life, sans waste; remainder to trustees, &c.; remainder to his first and other sons in tail male: and for default of such issue the testator devised the estate at *Swinstead to such person and persons, and for such estate and estates, as*

 should

1810.

The Earl and Countess of Cholmondeley against Maxey.

should AT THAT TIME *and from time to time afterwards be entitled to the rest of his real estate by virtue of and under his will*. And the will contained a proviso that in case Ld. *Albemarle Bertie* or the heirs male of his body should ever be Duke of *Ancaster*, then and from thenceforth the said devise of his estate at *Swinstead* to Ld. *Albemarle Bertie*, and to his first and other sons in tail male, should cease and be void; and in such case, and from thenceforth, the testator devised all his said estate at *Swinstead unto the next person and persons, severally and successively, in remainder one after another, and for such estate and estates, as should* AT THAT TIME, *and from time to time be entitled thereto by virtue of the several other limitations in that his will, as in case Lord* Albemarle Bertie *were then actually dead, without issue male*. And the testator gave several annuities therein mentioned, and appointed his nephew the Duke of *Ancaster* sole executor of his will. By a codicil to his will, dated 4th *Jan.* 1741, the testator, after noticing the death of the Duke his nephew, appointed his nephews Ld. *Vere* and Ld. *Montagu Bertie* his executors.

On the testator's death 8th *Feb.* 1741, the will and codicil were proved by Ld. *Vere* alone. Ld. *Albemarle* died *May* 16th, 1765, without having ever been married; and Ld. *Montagu* died 12th *Dec.* 1753, without having ever had any male issue; and Ld. *Vere* died 13th *Sept.* 1768, without leaving any male issue him surviving. Upon the death of Ld. *Vere*, Ld. *Brownlow* entered into possession of all the devised estates, including the *Swinstead* estate, and upon the death of Duke *Robert* in 1779 became Duke of *Ancaster*. *Peregrine* Duke of *Ancaster*, called in the said will Marquis of *Lindsey*, and who was the heir at law of the testator, by his will dated 11th *Jan.* 1775, devised

1810.
Lessee of The Earl and Countess of Cholmondeley, against Maxey.

devised to his wife *Mary* Duchess of *Ancaster* and to certain other persons all his lands, &c., not in settlement, and all his real estate, freehold and copyhold, and all his personal estate, &c., in trust to and for his son *Robert* Marquis of *Lindsey*, his heirs and assigns for ever, subject to the payment of debts, funeral expences, and legacies, &c. And in addition to the portion of 5000*l.* each to his two daughters *Priscilla Barbara Elizabeth Bertie*, and *Georgiana Charlotte Bertie*, provided by act of parliament, he directed 5000*l.* more to be paid to each at their ages of 18 years, or days of marriage. And in case his son *Robert* Marquis of *Lindsey* should die before he attained the age of 21, and without issue, and the said testator should leave no other son, he devised all his real estates to his two daughters, as tenants in common, and to the heirs of their bodies; subject to the payment of his debts, &c.; and in default of such issue, he gave the whole of his said estates, subject as aforesaid, to his wife in fee, and appointed her sole executrix. *Peregrine* Duke of *Ancaster* died on the 12th of *August* 1778, leaving his only son *Robert* Marquis of *Lindsay* his heir at law, who upon his decease became Duke of *Ancaster*, and his said two daughters, him surviving. Duke *Robert* having attained the age of 21, and being the heir at law of *Albemarle Bertie*, the first testator, by his will of the 29th of *May* 1779, after giving his leasehold house in *Berkeley-square* and some furniture to the duchess, his mother; as to all the rest and residue of his personal and real estate, by virtue of all powers and authorities to him appertaining, he devised the same in manner therein mentioned. And then the case set out so much of the will of Duke *Robert*, (which was set out for another purpose in the for-

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

mer case of *Doe, on the Demise of the Earl and Countess of Cholmondeley* v. *Weatherby*, 11 *East*, 323.) as shewed that the estates in question, including the *Swinstead* estate by name, were devised by his grace, (if it were competent for him to do so) to his sister the now Lady *Willoughby de Eresby* for life, and to her sons and daughters successively in tail male, in strict settlement, with remainder to his other sister, the now Countess of *Cholmondeley*, for life, with remainder to her sons and daughters successively in tail male; remainder to his own right heirs for ever. The case then stated the death of Duke *Robert* on the 8th of *July* 1779, without having ever been married; leaving the Lady *Priscilla* (now Baroness *Willoughby* of *Eresby*) and the Lady *Georgiana* (now Countess of *Cholmondeley*), his sisters and co-heiresses at law him surviving, who are also the heirs at law of *Albemarle Bertie*, the first named testator; and Lord *Brownlow Bertie* thereupon became Duke of *Ancaster*, and died in *February* 1809, without having ever had any male issue. The case also stated the death of Lord *Robert Bertie* on the 10th of *March* 1782, who was mentioned in the will of Duke *Robert*, without ever having had any issue male. The question reserved was, whether the plaintiff were entitled to recover the moiety of the *Swinstead* estate in the declaration mentioned; Lady *Willoughby* and Lady *Cholmondeley* being the heiresses at law of the Hon. *Albemarle Bertie*, the first testator, at the time of the death of *Brownlow* Duke of *Ancaster* without issue; or whether the remainder of the whole of the said estate vested in Duke *Peregrine*, as his heir at law at the time of the decease of *Albemarle Bertie*, and passed under the will of Duke *Peregrine* and that of Duke *Robert* to Lady *Willoughby*.

Scarlett,

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

Scarlett for the plaintiff stated the question in substance to be, whether Duke *Peregrine* or Duke *Robert* of *Ancaster* had a vested remainder in the estate at *Swinstead*: if either of them had, it passed under his will. But he contended, that the devise of the *Swinstead* estate, upon the death of Lord *Brownlow Bertie* without issue male, "to such person and persons, and for such estate and estates as should *at that time* and from time to time afterwards be entitled to the rest of the testator's real estate by virtue of and under his will," was a *contingent*, and not a vested remainder in the person who should be so entitled at the death of Lord *Brownlow* without issue male. The testator, as to this estate, departs from the order of succession established as to the other. The person who was to take on failure of issue male of Lord *Brownlow* could not be ascertained till the event took place: it is limited to the person who *at that time* should be so entitled to the other estate and for such estate, &c.; which is quite inconsistent in the terms of it with the notion of an interest vested before in any person. There were several persons who might be entitled at the happening of that event: as if, on the death of Lord *Brownlow* without issue male, Lord *Vere* had been living, he would have been entitled for life, with successive remainders in tail male to his first and other sons; or if Lord *Vere* had been dead, leaving a son, that son would have been entitled in tail male. But if the whole line had failed, then the next entitled would have been such person as was then heir at law to Lord *Brownlow Bertie*. Now one of the first qualities of a contingent remainder is the uncertainty of the person who is to take under the particular description before the event happens. [Lord *Ellenborough* C. J. Is it not the same as if the testator had repeated the words of limitation to his own

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

right heir?] That would depend upon what he meant by this description: and he seems to have intended to prevent the estate from going to the heir at law and being swallowed up in the dukedom, as long as he could, and till he had exhausted every other line. He did not mean that the *Swinstead* estate should go in the same line as he had before chalked out for the other estate; for he begins with a different order of succession. [Lord *Ellenborough* C. J. The same persons are to take, though in a different order; and after having carried the estate through the particular persons named, did he not intend by the concluding general words, that it should perform the same revolutions through the same descriptions of persons whom he had before mentioned for the other estate; only he appears to have got tired of repeating the same words. *Bayley* J. The plaintiff's argument is founded upon a supposition that the testator meant the two estates to go different ways.] It is so, until they were ultimately to unite on failure of the particular lines to which the *Swinstead* estate was limited. A vested remainder must vest either when the particular estate is created, or at least before it expires; but if a remainder be made to depend upon an event at the expiration of the particular estate, that is a contingent remainder. [Lord *Ellenborough* C. J. Though the union of the estates in possession was not to take effect till the death of Lord *Brownlow Bertie* without issue male, yet the remainder might vest before.] It could not be ascertained *till that time* who was to take. Then if this remainder were contingent, the ultimate remainders must also be contingent. And if the estate were not conveyed away by the wills of Duke *Peregrine* and Duke *Robert*, the Countess of *Cholmondeley* and Lady *Gwydir* would be the persons entitled

to

to take under the limitation in the will of Lord *Albemarle Bertie* the testator.

Dampier contrà. It is contended that the limitation in question is a description of the person who is to take the *Swinstead* estate upon the death of Lord *Brownlow Bertie*; but a person who takes as *right heir* of the testator (for under that description of person Lady *Cholmondeley* must take the moiety of *Swinstead*, if at all,) does not take under the will, but by descent. It would have been the same under a deed. The whole of the real estate, excepting *Swinstead*, was limited after the deaths of Lord *Vere*, Lord *Montagu*, and Lord *Brownlow Bertie*, and on failure of issue male of all the three, to Lord *Albemarle Bertie* for life; remainder to his first and other sons in tail male; remainder to *Peregrine* Marquis of *Lindsey* for life; remainder to his second and other younger sons in tail male; remainder *to the testator's own right heirs*. Then he devised the *Swinstead* estate successively to three of the persons by name, and their first and other sons in tail male, to whom the residue of the estate had been first devised, only in a different order of succession; namely, first to Lord *Albemarle*, next to Lord *Montagu*, and then to Lord *Brownlow*; and then follow the words of reference. Now supposing that the testator had expressed his meaning as to the *Swinstead* estate at length, instead of by reference to the dispositions of the other estate in the former part of the will, it would have stood thus; remainder to Lord *Vere Bertie* for life; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to the Marquis of *Lindsey* for life; remainder to trustees, &c.; remainder to his second and other younger sons in tail male; with the ultimate remainder to the

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Marsy.

the testator's *own right heirs;* in which case there could have been no question but that such remainder would have vested on his death in those heirs as undisposed of by the will. But it is said that the words *at that time,* annexed to Lord *Brownlow Bertie*'s dying without issue, vary the descent of the ultimate estate, and make it a contingent remainder in the person or persons who at the time of that event was or were the testator's heir at law. There ought however to be a strong intent shewn to warrant such a construction; and no such intent appears. Suppose Lord *Albemarle Bertie* had come to the dukedom, were there to be two contingencies? It is clear upon the proviso, that the testator meant no more than to remove Lord *Albemarle* and his male issue out of the order of limitations on his accession to the dukedom; and he does nothing more as to the subsequent limitations on failure of all the special limitations expressed. It is not material to consider whether the remainders to Lord *Vere* and to his first and other sons, and to Lord *Lindsey* and his second and other younger sons, were vested, or contingent; though it seems they were vested. [*Bayley* J. They were vested as to those in esse; contingent as to those not in esse.] After the limitation to the duke, his nephew, the testator wished to keep his estates in the male line, and not to have either of them joined with the dukedom while there were others of the family to take them: to keep *Swinstead* severed from the rest for a time; but afterwards his intention was that all should go together. The words *at that time* will not be inoperative by this construction; for they may be referred to the persons to whom he had before given the particular estates; otherwise the following words, *and from time to time,* can have no operation; for the latter words cannot refer to the death of Lord *Brownlow*

without

1810.

Doe, Lessee of The Earl and Countess of CHOLMONDELEY, against MAXEY.

without issue. It was not certain that the ultimate remainder would take effect in possession immediately on failure of issue male of Lord *Brownlow*; Lord *Vere* might have left sons, and Duke *Peregrine* more sons than one. But there is one decisive reason against construing the ultimate remainder to be contingent; for the person to whom it is supposed to be limited must be one who takes the rest of the testator's real estate *under and by virtue of his will*. Now his *right heirs* cannot take his real estate under his will: the remainder to them is undisposed of, and they take the reversion by descent. A limitation to the heirs of a third person may operate as a contingent remainder (*a*); but a limitation by deed or will to the right heirs of the grantor or devisor (he having no previous freehold in the case of a deed) is only the old reversion. And it is a vested interest notwithstanding it may be preceded by contingent limitations to persons not in esse, as the fee is not disposed of (*b*). The plaintiff's construction therefore cuts out of the will the words "*by virtue of and under the will*," and substitutes "and as to the reversion in fee in *Swinstead*, to such person who will be my heir at the death of Lord *Brownlow* without issue male"; which person would take nothing under the will in the rest of the estate, and might be a different person from him in whom the reversion of the rest of the estate not passing under the will might then be vested: and this construction would go to disjoin the estates which the testator in those events meant to be joined.

Scarlett, in reply, as to the contingency of the remainder "to such person and persons &c. as should *at*

(*a*) Vide *Fearne's Cont. Rem.* 66. 4th edit. (*b*) *Ib.* 338.

that

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

that time &c. be entitled to the rest of his real estate," put the case, if the limitation had been in terms to one of the younger sons of the Marquis of *Lindsey*, "*if at that time he* should be entitled to the other estate," and so to every other person who might be so entitled at that time: it could not be doubted but that it would be a contingent remainder; for Lord *Vere* might be living at that time, and yet not entitled to take the other estate under the will. The defendant's construction rejects the words *at that time*, &c. [*Le Blanc* J. Must not the words *at that time* have been implied, if they had not been inserted?] The words are coupled with the right of possession of the other estate; and if he meant that the *Swinstead* estate was not to vest in interest till vested in possession re-united to the other estate, he could not have used more effectual words. [*Bayley* J. But how is it shewn that Lady *Willoughby* and Lady *Cholmondeley* would take the rest of the estate *under the will*?] It must be admitted that they would take by *descent*, that being their better title: but still, where the question is upon the intention of the testator, if the intent appear that the heir should take at a certain time and in a certain event, the argument is not affected by that consideration; for the rule of law would not alter the testator's intention, which was that the heir at law should not take an immediate vested interest, but that it should be suspended and contingent till the death of Lord *Brownlow Bertie* without issue. In *Doe* v. *Saunders* (*a*) a devise of the reversion of a certain estate to the testator's right heirs, though they would still take by descent, was held operative to shew his intention that such reversion should not pass by a

(*a*) *Cowp.* 420.

devise

devise of the residue of his real estate to another in fee. Suppose the devise had been to the *heir* of a stranger, would it not have been the person who was heir at the time when the estate was to go over? [*Bayley* J. That would have been the same thing. If the devise over had been to the heir of *A.* who was then living, and *A.* then had a son who would have taken under that description, as a descriptio personæ (*a*); and that son had died before Lord *Brownlow Bertie*; the person who would take upon Lord *Brownlow*'s death as the heir of *A.*'s son would take by descent, and not as a purchaser under the will.]

Lord ELLENBOROUGH C. J. Upon the construction of this will I have not been able to form any doubt: it has always presented to my mind one clear, distinct, and very intelligible purpose. The testator, having several estates, first disposes of all but *Swinstead*, and gives them successively to the Duke of *Ancaster*, for life; and then in moieties to Ld. *Vere* and Ld. *Montagu Bertie* for life, and to their several first and other sons in tail male; remainder as to each respective moiety to Ld. *Brownlow Bertie* for life, and to his first and other sons in tail male: but in case Ld. *Brownlow* should die in the lifetime of Ld. *Vere* or Ld. *Montagu* without issue male, and only Ld. *Vere* or Ld. *Montagu* should have issue male, then the whole of the other estates, except *Swinstead*, was to go to which ever of them, Ld. *Vere*, or Ld. *Montagu*, should have issue male then living, for life; remainder to his first and other sons in tail male: and on failure of issue of all the three, Ld. *Vere*, Ld. *Montagu*, and Ld. *Brownlow*, he devised the whole of the other real estates, except *Swinstead*, to Ld. *Albemarle Bertie* for life, and to

(*a*) Vide *Burchett* v. *Durdant*, 2 *Ventr.* 311 and *Darbison* v. *Beaumont*, 1 *Pr. Wms.* 229.

his

1816.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

his first and other sons in tail male; remainder to *Peregrine* Marquis of *Lindsey* for life, and to his second and other younger sons in tail male; with the ultimate remainder to the testator's *own right heirs for ever:* which latter it was unnecessary for him to devise, for it remained notwithstanding in him as an undisposed reversion, and descended to his own right heirs. Then with respect to *Swinstead* he adopts a different course: after the death of the Duke, he first takes Ld. *Albemarle* and his sons, next Ld. *Montagu* and his sons, and then Ld. *Brownlow* and his sons; and then he directs that, on failure of male issue of Ld. *Brownlow,* that estate shall go "to such person and persons, and for such estate and estates, as should *at that time* and from time to time afterwards be entitled to the rest of his real estate *by virtue of and under his will.*" Who then are those persons who might be entitled to the rest of his real estate under his will? Ld. *Albemarle* and Ld. *Montagu,* and their male issue, had preceded Ld. *Brownlow* in the limitations of the estate: and there remained, of those mentioned in the first devise, the Marquis of *Lindsey* and his younger sons: therefore, as verba relata hoc maximè operantur per referentiam, ut in eis inesse videntur (*a*); it is the same as if he had repeated the same limitations as in the former devise. But he says nothing of the reversion in fee in *Swinstead,* and therefore it would go, as in the devise of the former estate is expressed, to his own right heirs. And the only operation of such a devise in terms is to exclude a conclusion that any other person was intended to take it; for certainly his heirs would take by descent and not by the will. The terms of reference amount to no more than if the testator had said —without further specification, let *Swinstead* estate go after failure of issue of Ld. *Brownlow* in the same manner

(*a*) Vide *Co. Lit.* 359 *a.*

as the rest of the estate has been before limited. It seems therefore clear, that this reversion, which was undisposed of by the will, descended to and vested in interest in *Peregrine* Duke of *Ancaster* as heir at law, and from him passed to Duke *Robert*; and that on the exhaustion of the line of Ld. *Brownlow Bertie*, who had become Duke of *Ancaster*, it was well vested under the will of Duke *Robert* in Lady *Willoughby*.

GROSE J. declared himself of the same opinion.

LE BLANC J. By the first part of the will the real property, excepting the *Swinstead* estate, is given to the several persons of the family and to their first and other sons in tail male, in the order enumerated, with the ultimate remainder to the devisor's own right heirs. Then as to the *Swinstead* estate, having limited it to some of the persons before named, though in a different order, he devises it on failure of male issue of Ld. *Brownlow*, in general terms of reference, to "such person and persons, and for such estate and estates, as should *at that time*, and from time to time afterwards be entitled to the rest of his real estate by virtue of and under his will." The argument is, that the words *at that time* operate upon all the persons who might take the other estates, including the devisor's own right heirs, and that his heir would take under the will. Now supposing the devisor to have contemplated that his heir would take the ultimate remainder in fee under the devise in the first part of his will, it would still be the same in this case; for the ultimate remainder in fee would still vest on his death in the same person who was then his heir at law. But I consider that his meaning, in adverting in the second part to the person

1810.

Doe, Lessee of The Earl and Countess of Cholmondeley, against Maxey.

and persons who should *at that time* be entitled to the rest of his estate, was with reference only to the particular persons of his family who were before enumerated; and then the ultimate remainder would still go to the devisor's own right heirs, and that would vest in the person who was right heir at the time of the devisor's own death, and it would vest by descent.

Bayley J. It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; but if it will admit of being considered as a vested remainder, the Court will always read it as such; because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated. Now an ultimate remainder to a person's own right heirs looks to nobody in particular, and is generally considered as merely leaving the remainder of the estate in the testator, for the purpose of descent; and such probably was the actual intention of this testator on the limitation of the first estate in the will: but if he did look to any person in particular, it would only be to the person who would be his heir at the time of his death. Then it is not likely, if he looked to his next immediate heir in the first clause, that he should be looking in the clause in question to such person as would be his heir at the time of the death not merely of Ld. *Brownlow Bertie*, but of Ld. *Brownlow Bertie without male issue*; which is looking to an indefinite period; for the remainder to such person and persons, &c. is not limited for default of issue at Ld. *Brownlow*'s death, but for default of issue male of his first and other sons. It is not likely that the testator should have looked to so indefinite a period for the vesting of this

 remainder.

Doe, Lessee of The Earl and Countess of CHOLMONDELEY, against MAXEY.

remainder. The other estate had been before limited to several persons successively for life, with successive estates in tail male to their sons; and when the testator, in devising this estate at *Swinstead*, after naming some of those persons, gave it, on failure of the issue male of Lord *Brownlow*, to such person and persons as should *at that time* be entitled to the rest of the estate under his will, he was looking to the estates for lives and in tail which he had devised in the rest of the property, and was not probably looking further. But he could not be contemplating the lessor of the plaintiff; for if he meant any particular person by the designation of his own right heirs, it must be taken to be the person who would be his right heir at the time of his death.

Postea to the Defendant.

FORSTER and Another *against* SURTEES and Others.

Friday, July 6th.

Where by agreement between the plaintiffs, bankers at *Carlisle*, and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date; held that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement, but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants who had obtained their certificates.

THE plaintiffs declared in assumpsit, and stated that, before the making of the promise by the defendants aftermentioned, the plaintiffs were bankers at *Carlisle*, and the defendants were bankers at *Newcastle-upon-Tyne*; and that it was the usage and practice agreed upon between them for their mutual accommodation and advantage, that the plaintiffs should weekly on *Saturday* forward to

1810.

Forster *against* Surtees.

the defendants for their use all the bank notes issued payable on demand by the defendants as such bankers, or by any other banking house in *Newcastle-upon-Tyne*, *Northumberland*, *Durham*, *Yorkshire*, or *Berwick-upon-Tweed*, which should in the week next preceding such *Saturday*, or on that day, have come to the plaintiffs' possession: and that the defendants, having received such notes, should on or before *Friday* weekly forward to the plaintiffs for their use all the bank notes issued payable on demand by the plaintiffs as such bankers, or by any other bankers carrying on that business in *Cumberland* or *Westmoreland*, which should on such *Friday*, or other earlier day of forwarding the same, be in the defendants' possession: and if on such *Friday* or earlier day the bank notes so to be forwarded by the defendants to the plaintiffs for their use should amount to a less sum than the bank notes forwarded on the *Saturday* next preceding to and received by the defendants for their use, deducting from such amount any sums for which the plaintiffs might have or had, in stating their account on such *Saturday* with the defendants, made themselves debtors to the defendants as hereafter mentioned, there was a further usage and practice agreed upon and observed as aforesaid, for the ends aforesaid, that the defendants should together with the last-mentioned bank notes, if any, on such *Friday* or earlier day to be forwarded, and forwarded by them as aforesaid, forward to the plaintiffs a bill of exchange drawn by the defendants upon any banker in *London*, for payment of the difference between the respective amounts, to the plaintiffs or their order, or to the order of the plaintiffs in 20 days after date; such bill being dated on the *Tuesday* preceding such *Friday*: or if no such bank notes were on such *Friday* or earlier day in the defendants'

ants' possession, to forward to the plaintiffs on such *Friday* or other earlier day, another bill of exchange drawn and dated as aforesaid for the payment of the amount of the bank notes forwarded on the *Saturday* next preceding by the plaintiffs to the defendants, deducting as aforesaid: and if the bank notes forwarded on any *Friday* or earlier day by the defendants to the plaintiffs were for a larger amount than the bank notes forwarded on the *Saturday* next preceding by the plaintiffs to the defendants, deducting as aforesaid, then there was a further usage and practice agreed upon and observed as aforesaid, for the ends aforesaid, that the plaintiffs should in stating their account on the *Saturday* next following with the defendants in respect of the bank notes by them on such *Saturday* forwarded to the defendants, make themselves debtors to the defendants for the difference of the amounts; or, if that difference should exceed the amount of the last mentioned notes, to forward, together with those notes, to the defendants a bill drawn by the plaintiffs upon any bankers in *London* for payment of the excess to the defendants or their order, or to the order of the defendants in 20 days after date; such bill being dated on that *Saturday*. And then the count proceeded, that on the 25th of *June* 1803, in consideration that the plaintiffs (not being made nor being debtors to the defendants for any difference or otherwise howsoever in respect of bank notes by the defendants on the *Friday* or other day next preceding, or at any other time forwarded, according to the usage and practice aforesaid, to the plaintiffs for their use, or in any other manner,) at the defendants' request had, according to the usage aforesaid (inter alia) forwarded to the defendants on that day, being *Saturday*, for their use, divers bank notes issued by the defendants

1810.

FORSTER against SURTEES.

for payment on demand of divers sums amounting, to wit, to 500*l.*, also other bank notes, &c., (mentioning the amount of bank notes of different bankers falling within the description agreed upon,) which said sums collectively amounted to 1984*l.* 17*s.* 0*d.*, being all that in the week preceding had come to the plaintiffs' possession; and that the defendants had received the same; the defendants promised in return, according to the usage aforesaid, to forward on or before the *Friday* then next to the plaintiffs, for their use, all the bank notes issued payable on demand by the plaintiffs, as bankers, or by any other bankers in *Cumberland* and *Westmoreland* or either of them, which should then be in the defendants' possession; or if the same should not be payable for sums amounting to 1984*l.* 17*s.* 0*d.*, to forward on such *Friday* or other earlier day, together with such notes, if any, to the plaintiffs, a bill drawn by the defendants upon bankers in *London* for payment of the difference between the amount and the 1984*l.* 17*s.* 0*d.* to the plaintiffs or their order, or to the order of the plaintiffs 20 days after date, the same being dated on the *Tuesday* preceding the *Friday*; or if no such bank notes should be in the defendants' possession, to forward on the same *Friday* or other earlier day to the plaintiffs a bill drawn and dated as last aforesaid for the said 1984*l.* 17*s.* 0*d.* And then it alleged, as a breach, that although on or before such *Friday* divers bank notes as last aforesaid were in the defendants' possession, yet the defendants did not nor would on or before that *Friday* or afterwards forward to the plaintiffs, or to any other for their use, all those bank notes or any part thereof, or any other bank notes, or a bill for the said 1984*l.* 17*s.* 0*d.* or any part thereof. There was another special count laying the promise more shortly; and other common counts

upon

upon an indebitati assumpserunt for money paid, money had and received, and upon an account stated. To all which the defendants pleaded, 1st, the general issue; 2dly, that after the making of the promises in the declaration mentioned, and before the exhibiting of the plaintiff's bill, to wit, on the 1st of *June* 1806, the defendants became bankrupts, within the statutes, &c.; and that the several causes of action accrued to the plaintiffs before the said bankruptcy; 3dly, the defendants pleaded a special plea of their bankruptcy, in which it was averred, that after the causes of action stated in the declaration, and after the expiration of 20 days and 3 days from the times mentioned in the 1st and 2d counts to have been appointed for dates of the bills of exchange therein mentioned, and which were to be forwarded by the defendants as therein mentioned, and after the times when those bills of exchange according to their tenor and effect would have been due and payable, the defendants became and were bankrupts within the intent and meaning of the statutes, &c.; and so proceeded to shew by formal averments that they became bankrupts, and obtained their certificates: concluding that the causes of action accrued to the plaintiffs against the defendants before the time, and more than 23 days before the time, when they so became bankrupts as aforesaid. To these special pleas the plaintiffs demurred generally.

This case first came on to be argued in the last term, before the last special plea of bankruptcy was added. But when in the course of the argument upon the general question, whether the plaintiffs could wave their claim as for a debt arising upon the contract, and sue for damages as for a tort in the breach of it, and thus

1810.

FORSTER *against* SURTEES.

avoid the effect of the defendants' certificates, stress was laid upon its not appearing distinctly but that the bankruptcy might have happened before the expiration of the 20 days and 3 days of grace, for which the bill for the weekly difference was to be given; during which time the defendants might be considered as entitled to a credit sub modo; (though it was observed that the general plea of bankruptcy stated *the causes of action* to have accrued to the plaintiffs before the bankruptcy of the defendants:) the Court, to avoid all doubt, gave leave to amend by adding the special plea of bankruptcy which was warranted by the facts of the case. It now came on to be argued distinctly upon the general question.

Holroyd for the plaintiffs contended that the breach of contract set forth in the declaration, for which they sought to recover a compensation in damages, did not constitute a *debt* proveable under the defendants' commission at the time of their bankruptcy. But that though the plaintiffs might have treated their claim as a debt; yet this was one of the many cases where the party has an option to wave his claim as a debt, and proceed to recover the amount in damages, as for a tort: like as in *Goodtitle* v. *North* (*a*), where a plea of bankruptcy and certificate was held to be no bar to an action of trespass for mesne profits; though it was admitted that it would have been to an action for use and occupation; taking the rent there as the certain measure of damages. And the same principle was established in *Utterson* v. *Vernon* (*b*): and again in *Parker* v. *Norton* (*c*). In *Utterson* v. *Vernon and others, Assignees of Tyler*, the plaintiff had lent stock to the

(*a*) *Dougl.* 584. (*b*) 3 *Term Rep.* 539. and 4 *Term Rep.* 570.
(*c*) 6 *Term Rep.* 695.

1810.

FORSTER *against* SURTEES.

the bankrupt before her bankruptcy, which was to be replaced on requeſt; and no requeſt having been made before the bankruptcy, it was held that he could not prove his debt under the commiſſion: and yet there the ſum due was capable of being aſcertained by reference to the value of the ſtock at the time of the bankruptcy: but the Court conſidered it only as a breach of contract for which the party was to be recompenſed in damages. Here then if the plaintiffs can make out their claim to reſt in damages, as for a breach of contract, they are not bound to treat it as a debt, however certain the meaſure of damages may be. The agreement was not only for the ſending of the defendants' own notes to them but the notes of other perſons alſo; and they were not *debtors* for the amount to the plaintiffs, but the defendants were to return to the plaintiffs the notes of the latter and thoſe of other *Cumberland* and *Weſtmorland* bankers on or before a future day, all which the plaintiffs would have been bound to receive; and it was only in caſe of any deficiency of ſuch notes to be returned that the defendants were to give a bill payable in futuro for ſuch deficiency. Non conſtat that the defendants had not bankers' notes in their hands at the time of the action brought, which they ought to have returned to the plaintiffs; and therefore the cauſe of action is not merely for the not giving the plaintiffs a bill of exchange for the difference, but for not returning the notes and giving the bill for the balance; and the payment by ſuch notes would have been good, though the notes were worth nothing. The caſes of *Muſſen* v. *Price* (a), *Miller* v. *Shaw* (b), and *Dutton* v. *Solomon* (c), do indeed ſhew that where goods are to be paid for by a

(a) 4 *Eaſt*, 147. (b) *Ib.* 149.
(c) 3 *Boſ. & Pull.* 582. and vide *Brooke* v. *White*, 1 *New Rep.* 330.

 bill

1810.

FORSTER *against* SHEPLEY.

bill at a certain credit, *after* the period of credit is expired, indebitatus assumpsit will lie; and therefore it must be admitted that indebitatus assumpsit would have lain after the 23 days in this case; but still the party may elect to treat it as a breach of contract, and bring his action for damages, and if he do the certificate is no bar; for no such bill having been given, the plaintiffs may rest upon the promise to send a bill payable in futuro; but such a promise is not proveable as a debt: and the stat. 7 *Geo.* 1. *c.* 31. *s.* 1. is confined to debt on bonds, bills, and notes, and other personal written securities(*a*) payable in futuro, which are made proveable under a commission of bankrupt.

Richardson contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. When a bankrupt is discharged by his certificate from a debt in one form, how can he be charged by the creditor in another form of action for the same debt. This is substantially the subject-matter of a debt, and not the case of a mere breach of duty for which the plaintiffs could have declared for or recovered any special damage ultra the debt for which the bill was to be given. And could not the defendants have paid the money into court? The privilege of returning other bills in payment of the defendants' bills before sent to them by the plaintiffs was a stipulation in favor of the defendants. The transaction is this; the plaintiffs send to the defendants notes of their own and of other bankers to a certain amount, which constitutes a debt against them; against which the defendants may exchange other

(*a*) Vide *Parslow* v. *Dearlove*, 4 *East*, 438. and *Hoskins* v *Duperoy*, 9 *East*, 498.

notes

notes of the plaintiffs and of other bankers in reduction of the balance: but if the defendants do not make any such return, they must be considered as having turned the notes sent by the plaintiffs into cash, and they consequently remain debtors for the amount, and are chargeable as such.

GROSE J. The not sending a bill for the balance was nothing more than the neglect or refusal to pay that which was a debt against the defendants in the manner which by the agreement they were privileged to do: as much as was not paid in the stipulated manner remained as a balance of debt due to the plaintiffs.

LE BLANC J. This was only a debt payable in a particular way, if the party availed himself of the agreement to do so.

BAYLEY J. The amount of the sum which the plaintiffs would have a right to demand in any case for a breach of the agreement would be liquidated damages. Supposing the defendants had had notes which they might have returned, but did not chuse to return them, would they not still be debtors for the amount of those which they had received?

Judgment for the Defendants.

1810.

Friday, July 6th.

WHITEHOUSE and Others, Assignees of TOWNSEND, a Bankrupt, *against* J. FROST and L. FROST, DUTTON, and BANCROFT.

A. having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price, and *B.* sold the same to *C.* and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the 10 tons, which continued mixed with the rest in *A.*'s cistern: yet held that this was a complete sale and delivery in law of the 10 tons by *B.* to *C.*; nothing remaining to be done on the part of the seller, though as between him and *A.*, it remained to be measured off: and therefore that the seller could not, upon the bankruptcy of the buyer before his acceptance became due, countermand the measuring off and delivery in fact of the 10 tons to the buyer: nor were the goods in transitu, so as to enable the seller to stop them.

IN trover to recover the value of some oil, the property of the bankrupt, which was tried at *Lancaster* in *March* last, a verdict was found for the plaintiffs for 390*l.*, subject to the opinion of the Court on the following case.

The plaintiffs are assignees of *John Townsend*, late a merchant at *Liverpool*: the two *Frosts* are merchants and partners in *Liverpool*; and the other defendants *Dutton* and *Bancroft* are also merchants and partners in the same town. On the 7th of *February* 1809 *Townsend* purchased from the defendants *J.* and *L. Frost* 10 tons of oil at 39*l.* per ton, amounting to 390*l.*, for which *Townsend* was to give his acceptance payable 4 months after date; and a bill of parcels was rendered to *Townsend* by the *Frosts*, a copy of which is as follows—"*Liverpool*, 7th *Feb.* 1809—Mr. *John Townsend*, bought of *J.* and *L. Frost*, ten tons *Greenland* whale oil in Mr. *Staniforth*'s cisterns, at your risk at 39*l.* - - - - - - - £390

Cr.

1809. *Feb.* 14. By acceptance - - £390

For *J.* and *L. F.* *Wm. Pemberton.*"

The said 10 tons of oil at the time of his purchase were part of 40 tons of oil lying in one of the cisterns in the oil house at *Liverpool*, the key of which cistern was in the custody of the other defendants *Dutton* and *Bancroft*, who

 had

1810.

WHITEHOUSE and Others against FROST and Others.

had before that time purchased from *J. R.* and *J. Freme* of *Liverpool*, merchants, the said 40 tons of oil in the same cistern; and upon such purchase received from the *Fremes* the key of the cistern. Afterwards *Dutton* and *Bancroft* sold 10 of the 40 tons they had so bought (being the 10 tons in question) to the defendants, the *Frosts*; who sold the same in the manner before stated to *Townsend*. On the 7th of *February*, the day on which *Townsend* bought the 10 tons of oil, he received from the defendants *Frosts* an order on *Dutton* and *Bancroft*, who held the key of such cistern, they having other interest therein as aforesaid, to deliver to him *Townsend* the said 10 tons of oil; a copy of which is as follows — "Messrs. *Dutton* and *Bancroft*, please to deliver the bearer Mr. *John Townsend* 10 tons *Greenland* whale oil, we purchased from you 8th *Nov.* last. (Signed) *J.* and *L. Frost*." The order was taken to *Dutton* and *Bancroft* by *Townsend*, and accepted by them upon the face of the order, as follows; "1809. Accepted, 14th *Feb.* *Dutton* and *Bancroft*." *Townsend* according to the terms of the bill of parcels, namely, on the 14th of *Feb.* 1809, gave to the defendants *Frosts* his acceptance for the amount of the oil, payable 4 months after date; but which acceptance has not been paid. *Townsend* never demanded the oil from *Dutton* and *Bancroft* who had the custody of it. The oil was not subject to any rent; the original importer having paid the rent for 12 months, and sold it rent free for that time, which was not expired at *Townsend*'s bankruptcy. On the 23d of *May* 1809, about 3 months after the purchase of the 10 tons of oil, a commission of bankrupt issued against *Townsend*, under which he was duly declared a bankrupt, and the plaintiffs appointed his assignees. At the time of the purchase, and also at the time of *Town*-

send's

1810.

WHITEHOUSE and Others *against* FROST and Others.

send's being declared a bankrupt, the oil was lying in the ciftern mixed with other oil in the fame; and fome time afterwards the defendants refufed to deliver the fame to the plaintiffs; notwithftanding a demand was made for the fame by the affignees, and a tender of any charges due in refpect thereof. When the whole of the oil lying in any of the cifterns in the oil houfe is fold to one perfon, the purchafer receives the key of the ciftern; but when a fmall parcel is fold, the key remains with the original owner; and the purchafer is charged, in proportion to the quantity of oil fold, with rent for the fame, until delivered out of the oil houfe; unlefs fuch rent be paid by the original importer, as was the fact in the prefent cafe. If the plaintiffs were entitled to recover, the verdict was to ftand: if not, a nonfuit was to be entered.

There was a fimilar action by the fame plaintiffs againft *J. R. Freme* and *J. Freme*, *Dutton*, and *Bancroft*, the circumftances of which were in fubftance the fame.

Js. Clarke, for the plaintiffs, contended that there was fuch a conftructive delivery of the 10 tons of oil to the bankrupt before his bankruptcy, as was fufficient to veft the property of it in him. The oil was at the time in the hands of third perfons, who had the key of the warehoufe; and therefore the vendors could not make an actual or manual delivery of it, or of the key of the warehoufe; but they did that which was equivalent; for they gave to *Townfend* an order of delivery upon their immediate vendors, who continued to retain the actual cuftody of it blended with the remainder, their own property; and by their acceptance of that order, they muft be taken to have agreed to hold the 10 tons as bailees of the vendee. In

Rugg

Rugg v. *Minett* (*a*) Lord *Ellenborough* said, that "every thing having been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter:" and that distinguishes this case from *Hanson* v. *Meyer* (*b*), where the vendor gave a note to the vendee addressed to the warehouse-keeper, directing him to *weigh* and deliver to the vendee all his starch: there, something remained to be done, namely, the *weighing* by the warehouse-keeper, before the property passed. But here, it is expressly stated in the bought and sold note of the 7th of *Feb.* that the 10 tons in Mr. *Staniforth*'s cistern were *at the risk* of *Townsend*, the purchaser. So in *Harman and others, Assignees of Dudley, a Bankrupt*, v. *Anderson* (*c*), the purchaser of goods having received from the vendor an order for the delivery of them addressed to the wharfinger in whose warehouse the goods lay, the lodging of such order with the wharfinger by the purchaser was held by this Court to be a complete delivery to him, so as to take away the vendor's right to stop the goods in transitu. And in *Chaplin* v. *Rogers* (*d*), which was the case of a sale of a haystack, Lord *Kenyon* said, "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property." And *Elmore* v. *Stone* (*e*) is strong to the same effect; for there the agreement of the vendor himself to keep the horses at

(*a*) 11 *East*, 217.
(*b*) 6 *East*, 614 and vide *Zagury* v *Furnell*, 2 *Campb.* N. P. *Cas.* 240.
(*c*) 2 *Campb.* 243. (*d*) 1 *East*, 192. (*e*) 1 *Taunt.* 458.

livery

1810.

WHITEHOUSE and Others against FROST and Others.

livery which he had sold to the vendee was held to be a sufficient delivery to take the case out of the statute of frauds. [Lord *Ellenborough* C. J. The general doctrine will not be disputed, that there may be a symbolical delivery of goods. It was lately held in a case in the House of Lords that there might be an executed delivery of goods without any change of place of them. The only argument I presume will be, that the 10 tons of oil, before they were measured out from the whole quantity, were not in a deliverable state, and that till that was done they were not capable of delivery: I do not mean to say what the value of that argument is.] The drawing of that off from the rest was not to be the act of the vendors but of the vendee; and that is the distinction, that nothing here remained to be done by the vendors.

Scarlett, contrà, relied on the circumstance, that the 10 tons till measured off were not in a deliverable state in fact, and if so there could not be a symbolical delivery of them. No specific 10 tons were vested in the *Frosts*, and therefore none such could be conveyed to the bankrupt: in such a case the measuring off must of necessity precede the vesting of the property. [*Grose* J. Supposing a third person had taken the whole 40 tons tortiously, could not the vendee have brought his action of trover for the 10 tons.] As against a wrong-doer perhaps the Court would not regard the actual condition of the property. But suppose 30 of the tons were tortiously taken, how could it be told whether the 10 which remained were or were not the specific tons belonging to the vendee. [*Le Blanc* J. The same objection might be made if the vendee had paid for the 10 tons. Ld. *Ellenborough* C. J. Suppose the whole had been distrained for rent due from

Dutton

Dutton and *Bancroft*, whose share would cover the rent, and *Townsend* had brought replevin, and recovered; would the sheriff have to measure out the 10 tons? I throw it out for consideration: perhaps he would incidentally have the power of dividing it, the quantity being certain. It is a different case where the goods remain in the same hands, as the bailee of the vendee, or as the original seller; in the former case the vendor holds them in a new character.] Here there was nothing to discriminate the specific 10 tons from the rest.

Lord ELLENBOROUGH C. J. This case presents a difference from the ordinary cases which have occurred where the sale has been of chattels in their nature several, and where the transfer of the property from the vendor by means of an order for delivery addressed to the wharfinger or other person in whose keeping they were, and accepted by him, has been held to be equivalent to an actual delivery; the goods being at the time capable of being delivered. Here, however, there is this distinguishing circumstance, that the 10 tons of oil till measured off from the rest was not capable of a separate delivery; and the question is whether that be a distinction in substance or in semblance only. The whole 40 tons were at one time the property of *Dutton* and *Bancroft*, who had the key of the cistern which contained them; and they sold 10 tons to the *Frosts*, who sold the same to *Townsend*, the bankrupt, and gave him at the same time an order on *Dutton* and *Bancroft* for the delivery to him of the 10 tons. To that order *Dutton* and *Bancroft* attorn, as I may say; for they accept the order, by writing upon it "accepted, 14th of *Feb.* 1809," and signing their names

to

1810.

WHITEHOUSE and Others against FROST and Others.

to it. From that moment they became the bailees of *Townsend* the vendee: the goods had arrived at their journey's end, and were not in transitu: all the right then of the sellers was gone by the transfer, and they could no longer control that delivery to which they had virtually acceded by means of their order on *Dutton* and *Bancroft* accepted by the latter. The question of stopping in transitu does not arise, taking the *Frosts* to be the original sellers, as between them and the bankrupt; the oil had never been in the hands of the *Frosts*; they only assigned a right to it in the hands of the common bailees, which before had been assigned to them.

GROSE J. There can be no doubt that at the time of *Townsend*'s bankruptcy the 10 tons of oil in the cistern were at the risk of the bankrupt. All the delivery which could take place between these parties had taken place. *Dutton* and *Bancroft*, who had the custody of the whole in their cistern, had accepted the order of the sellers for the delivery to the bankrupt, and it only remained for *Townsend* together with *Dutton* and *Bancroft* to draw off the 10 tons from the rest.

LE BLANC J. *Dutton* and *Bancroft* had sold the ten tons of oil in question, (which was part of a larger quantity, the whole of which was under their lock and key) to the *Frosts*, who sold the same to *Townsend*; and there is no claim on the part of the defendants *Dutton* and *Bancroft* to detain the oil for warehouse rent. The *Frosts* never had any other possession of the oil than through *Dutton* and *Bancroft*; but they gave to *Townsend* an order on these latter to deliver it to him; and after the accept-

ance of that order *Dutton* and *Bancroft* held it for his use. But something, it is said, still remained to be done; namely, the measuring off of the 10 tons from the rest of the oil. Nothing however remained to be done in order to complete the sale. The objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price; neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to *Townsend*, that the quantity mentioned in the order was in the cistern in their custody; for they had before sold that quantity to the *Frosts*, of whom *Townsend* purchased it, and had received the price. Therefore though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale.

BAYLEY J. There is no question of transitus here: the goods were at their journey's end. When therefore *Dutton* and *Bancroft*, who were then the owners of the whole, sold 10 tons of the oil to the *Frosts*, those 10 tons became the property of the *Frosts*; and when they sold the same to *Townsend*, and gave him an order upon *Dutton* and *Bancroft* for the delivery of the 10 tons purchased of them, the effect of that order was to direct *Dutton* and *Bancroft* to consider as the property of *Townsend* the 10 tons in their possession, which before was considered as the property of the *Frosts*: and by the acceptance of that order *Dutton* and *Bancroft* admitted that they held the

1810.

Whitehouse and Others against Frost and Others.

10 tons for *Townsend*, as his property, and he had a right to go and take it, without the interference of the *Frosts*.

Postea to the Plaintiffs.

Saturday, July 7th.

Havelock *against* Geddes.

Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money *or* render the principal, and not absolutely to pay the condemnation money, as in case of reversal of outlawry upon the stat. 31 *Eliz.* c. 3. for want of proclamations, or upon the stat. 4 & 5 *W.* & *M.* c. 18. *s.* 3. on appearance by attorney and by motion.

THE plaintiff sued the defendant by original, and made an affidavit of debt; and the defendant having been outlawed afterwards came in, and brought a writ of error to reverse the outlawry, and assigned an error in fact, that he was beyond sea at the time of the outlawry; which fact, on issue joined, was found for him by the jury: and on *Wednesday* the 30th of *May* in the last term, being personally present in court, and having brought in the postea, he prayed by his counsel that the judgment of outlawry pronounced against him in this cause might be reversed. This was opposed on the part of the plaintiff, because the defendant's bail would not enter into a recognizance to satisfy the condemnation money, as required by the stat. 31 *Eliz.* c. 3., but only into the common recognizance of bail, which gives them the option to render their principal: and the question was, whether such a recognizance of bail were sufficient to entitle the defendant to the judgment of reversal. In support of that

Marryat and *Abbott* shewed these reasons to the Court. The defendant does not seek to reverse the outlawry for any defect of proclamations, and therefore he does not want the aid of the stat. 31 *Eliz.* c. 3., which requires him not only to put in bail to appear and answer to the plaintiff, but

but also to satisfy the condemnation money, before the outlawry is reversed for want of any proclamation required by that statute. Neither does he appear by attorney and move the Court upon the stat. 4 & 5 *W.* & *M.* *c.* 18. *s.* 3. to reverse the outlawry; but he prays such reversal in person, on account of a common law error in fact, found for him: and neither of these statutes subject the party to any new imposition to which he was not liable at common law, and where he does not claim the conditional benefit of either. Before the passing of the stat. 31 *Eliz.* there is no entry in the books of requiring bail on the reversal of an outlawry by writ of error, or suggestion entered on the roll, or by plea. *Vetus lib. Intras.* 78, 79. *Co. Entr.* 689. *et seq.* *Rast. Entr.* 285. *b.* 286. *a.* 287. *Error in Outlawry, pl.* 2. 4, 5, 6 & 7. which latter were subsequent to the stat. 6 *H.* 8. *c.* 4. as being reversals for want of proclamations, but prior to the 31 *Eliz.* And though pending the proceedings in several of these cases manucaptors are found, who undertake to surrender their own bodies if the party outlawed do not attend the court from day to day, as day is given to him; yet no recognizance of bail is entered to the action upon the reversal. And there is no instance in any of the modern precedents, where a party has prosecuted his writ of error in person, (and not by attorney) and has not sought the benefit of the stat. 31 *Eliz.*, that a recognizance of bail as required by that statute has been taken. *Hearne's Pleader*, 834. contains a precedent of the reversal of an outlawry, for the insufficiency of the return to the writ of exigent, without bail: and that, though not a reversal upon the stat. 31 *Eliz.*, must have been subsequent to that statute, because it mentions the date of 1646 in the course of the record of the proceedings. There is one entry in *Brown's Ent.* 359. (2d edit.) of a reversal of an outlawry

1810.

HAVELOCK *against* GEDDES.

by writ of error, without bail; and another (p. 361.) where the outlawry was avoided for the insignificancy of the words in the return to the exigent; in which the recognizance of bail is in the alternative, to render in execution, or pay, and not to pay the condemnation money at all events. This last might have been upon the award of the Court, on the inspection of the return and finding it bad. By the date of the entries, before and after, it should seem that these were between the stat. of *Eliz.* and that of *W.* & *M.* But where the party has prosecuted his writ of error for want of proclamations on the stat. 31 *Eliz.*, there the recognizance of bail has been taken to pay the condemnation money: otherwise not: as in *Lill. Entr.* 458. and 461. The same form of recognizance has been taken where the party has availed himself of the provision of the stat. 4 & 5 *W.* & *M.* to appear by attorney. In *Mathews* v. *Erbo* (*a*), it appeared that the party outlawed was a foreigner who never was in *England;* and he came in by attorney to reverse the outlawry, without bail; which was denied: but the Court said that he might bring a writ of error and reverse the outlawry if he pleased. The report in *Carthew* says he was compelled to bring a writ of error, and put in bail to the action, according to the new statute (4 & 5 *W.* & *M.*) and then the plaintiff consented to the reversal of the outlawry. There he did not appear in person. *Sercole* v. *Hanson* (*b*) in

(*a*) 10 *W.* 3. 1 *Ld. Ray.* 349. and *Carth.* 459.

(*b*) 1 *Wilf.* 3. vide S C 2 *Stra.* 1178. *Serecold* v. *Hampson, Bart.* and 1 *Salk* 496

The following is a more full note of the same case from Mr. *Short's* MS, a gentleman of the bar at that period.

SEROCOLD *against* HAMPSEY, *M.* 16 *Geo.* 2. *B.R.*

Error assigned, that the party was beyond sea at the time of the exigent proclaimed, is sufficient.

THIS was a writ of error to reverse an outlawry. The error assigned was that Sir *G. Hampsey* (the plaintiff in error) was beyond sea tempore promulgationis of the exigent.

Draper, for the plaintiff in error, cited 2 *Rol. Abr.* 804. *Cro Jac.* 464.

Lacey,

in *H.* 16 *G.* 2. is to the same effect. No intervening case appears in print till *Phillips* v. *Warburton*, *Mich. T.* 1785 (*a*), and *Berwick* v. *Parkin*, *E.* 31 *G.* 3. (*b*), in both of

(*a*) *Imp. Pract* 7th edit. 611.
(*b*) Referred to by *Lawrence* J. in *Matthews* v. *Gibson*, 8 *East*, 527.

Lacy, for the defendant, cited 2 *Rol. Rep.* 11. *Co. Lit.* 259. *b.* 261. *b.*

Curia. It has been determined that, as to the whole process of outlawry, it is not material in the assignment of error to shew that the party was out of the realm during the whole time; but if he were abroad at the time of the exigent, that is sufficient; for that is the substance. *Skin.* 16. So this assignment is sufficient. If the fact were that he was within the realm during the process of outlawry, and went abroad by way of covin at the time of the exigent, that should be replied.

Hil. 16 *Geo.* 2. On reversal of the outlawry on writ of error for such error assigned in a case where special bail was required in the original action, the Court will direct the recognizance of bail in answer to the new action to be taken in the alternative, to pay the condemnation money, *or* render the principal, and not absolutely to pay the condemnation money.

The outlawry being reversed, it came now before the Court upon the question, whether the defendant should be obliged to put in special bail? and the cases cited were *Lit. Rep.* 101. *Salk* 496. *Carth.* 459. 12 *Mod.* 545. *Wilbraham* v. *Doley*, *T.* 13 *W.* 3 and a case in *C. B.* when first *Willes* C. J. came there, where it was resolved that special bail should be put in.

LEE C. J. By stat 31 *Eliz* c 3 bail is to be given to a new action, and to satisfy the condemnation money where the reversal is for want of proclamation; but here the assignment of error is that the defendant was beyond the sea at the time, and not for want of proclamation. There is no case cited where bail may not be taken on reversal of an outlawry for other cause than that in the stat. 31 *Eliz.* By the case in *Salk* it does not appear what the assignment of error was, but there special bail was taken. But the case of *Wilbraham* and *Doley*, which I cited from a manuscript note, but which is reported in cases in King *William's* time, (12 *Mod.* 545) fully warrants the requiring special bail: for there it was held that the stat. 31 *Eliz.* only related to error for want of proclamation, and in that case only that statute requires bail; but yet though the statute did not extend to the case then before the Court, which was [ ]* they ordered bail to be taken to render the body or answer the condemnation money. But we are now upon the stat. of King *William*, 4 & 5 *W.* & *M.* c. 18. which plainly supposes a power in the Court to order special bail where it is required in the original action; for it says, the defendant may appear by attorney and reverse the outlawry in all cases, *except where special bail shall be ordered by the Court.* Therefore when it appears

* There are some words wanting here: the printed reports state that the assignment was of an error in law, not for want of proclamations.

1810.

HAVELOCK *against* GADDES.

of which the recognizance of bail was taken to answer the condemnation money only, and not in the alternative, to pay it or render the body. But it does not appear whether

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appears in the original action that the plaintiff was entitled to have special bail, the Court is fully authorized to order it, as upon the commencement of a new action Nor are we precluded by the late statute, 12 *G.* 1 by which the affidavit of the debt to hold to special bail must be filed before the process issues, because here cannot be a compliance with it; nor is there any writ to issue; but we have it in our power to order special bail *to pay the condemnation money, or render the body*, as was done in the case of *Wilbraham* and *Doly*.

WRIGHT J. In *Matthews* v. *Fels*, *Carth* 459. which was an outlawry against a foreigner, he was ordered to put in bail according to the new statute, which was the 4 & 5 *W.* 3, and that was not for want of proclamations. As to *Salk.* 496. that a recognizance was taken according to the stat 31 *Eliz. c.* 3, that was a mistake. Therefore I am of opinion, that as here is an affidavit of above 350*l.* due, special bail ought to be given before the outlawry be reversed.

DENNISON J. The practice in *C. B* before the statute of *W.* 3 was, as appears by a rule of *Trin.* 2 *Jac.* 2., that on reversal of the outlawry, and before the supersedeas, *special bail in the ordinary way was required to answer the condemnation or render the body*, if the sum on which the exigent was awarded was 10*l.* or upwards; but then the party outlawed appeared *in person*. The statute of King *William* was to dispense with that; and it says that it may be done *by attorney*, unless the Court require special bail, which is when the debt is above 10*l.* As to the stat. 12 *G.* 1. this case is not within that statute; for there is a difference between proceeding to an arrest, and an outlawry, for where it is to an outlawry, it is not by way of an arrest. That statute says you shall not proceed to arrest but where there is an affidavit that the debt is 10*l.* or upwards, but this being an outlawry by special original, it is not an arrest; and so it was not the intention of the act that in this case the affidavit of the debt should be in the first instance, and before any process issues. And this is no hardship to the defendant; for if it appear that the plaintiff's demand is above 10*l.* he ought to have special bail. In *Martin* v. *Duckett*, there were many errors assigned; and one was for want of proclamations: and there special bail was ordered to be put in. Though the present case is not for want of proclamation, yet it is expressly within the statute of *W.* 3., which is only to enforce that which was the law before, according to that rule in the common bench.

LEE C J. Let the rule to shew cause why the outlawry should not be reversed on filing common bail be discharged, and upon filing special bail to *pay the condemnation money, or render the body*, (*not absolute bail*,) let the outlawry be reversed.

those

those outlawries were reversed for want of proclamations, on the stat. 31 *Eliz.* And the only other case is *Mathews v. Gibson* (a), which came on upon motion, and where it seems to have been taken for granted that the point was established in the two last-mentioned cases which were referred to. The statute of *W.* & *M.* was made for facilitating reversals of outlawries, which will not be answered by imposing the necessity of a higher security of bail in a case where at common law the party was not liable to such a requisition: and the Court will not in their discretion impose an obligation upon the bringing of a writ of error at common law, which is not imposed by the statute. Here the defendant came in and offered to surrender, though by the indulgence of the plaintiff he was not committed to custody; but he attends the court in person from day to day given to him, and therefore is in effect in custody, being within the instant reach of the process of the court. And he asks no indulgence, or conditional benefit given by statute, but only insists on his common law right to shew that the first action was erroneously prosecuted against him, without being obliged to provide bail who shall be at all events answerable for the condemnation money in the new action.

Holroyd (b), contrà, contended that bail was requisite at common law in all cases upon the reversal of an outlawry, not only for want of proclamations upon the stat. 31 *Eliz.* c. 3. but in all cases, whether the party appeared in person or by attorney. It does not follow, because there is no entry of bail in the old entries of reversals of outlawry,

(a) 8 *East*, 527.

(b) Having been obliged to leave the Court soon after this argument commenced, I have this account of it from the hand of a friend.

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1810.

HAVELOCK *against* GEDDES.

that none was given: where the party had from day to day given to him, he must have continued in custody if bail were not given from day to day, and when judgment of reversal was pronounced, there was no occasion to make any entry of bail on the roll, though it might be required that he should give it. Some bail was clearly requisite in cases which required special bail; and the course of the Court for a long period back has been to require bail to answer the condemnation money absolutely. He referred to *Leighton* v. *Garnons* (a), and *Sty. Prac. Reg.* 271. to shew that by the outlawry, the process in the original action is at an end: and if the outlawry be after judgment, the party taken upon the capias utlagatum is in execution for the plaintiff in the civil suit: if before judgment, the plaintiff is put to a new action; and unless the defendant were compelled to put in special bail to answer such new suit, the plaintiff might in some cases be deprived of his remedy. This case is much stronger for requiring the bail to engage at all events for the condemnation money than the want of proclamations as required by the stat. 31 *Eliz.*; for there the plaintiff is himself guilty of a fault in not giving the party who has a known place of residence that notice which he is entitled to receive under the statute: a fortiori, therefore, in cases like the present where the plaintiff is in no default. And this provision of the statute confirms the probability that special bail was required at common law upon the reversal of an outlawry; and that it had been used to be taken in the form now required. The cases which have been mentioned as examples of the existing practice are also confirmatory of that inference. It would be extraordinary to require it in cases where the error is so apparent,

(a) *Cro. Eliz.* 706. and 5 *Rep.* 88.

as

as to induce the Court to set the outlawry aside upon motion; and yet to deny it upon writ of error, where prosecuted in person. In *Wilbraham* v. *Doley* (*o*), upon error brought to reverse an outlawry for an error in law; (not for want of proclamations on the stat. 31 *Eliz.*) though Lord *Holt* and the rest of the Court are first made to say that there needed no bail in such a case; yet they directed the party outlawed to put in bail to answer the condemnation or render his body. But Ld. *Holt* afterwards says, "that special bail to reverse an outlawry must be simply "to answer the condemnation; but other special bail is "to answer condemnation, or render his body: and it "was agreed that if the party were taken up upon the "capias utlagatum, he must give bail to reverse the outlawry." [*Bayley* J. referred to a dictum in *Cooke's Cas. of Prac. in C.B.* 29. *Anon. M.* 12 *G.*1. It was said by the Court, that upon or before the allowance of any writ of error, or reversing any outlawry, the defendant must still enter into a recognizance, with condition to satisfy the condemnation money, according to the stat. 31 *Eliz.* c. 3. *s.* 3.] He observed that that was stated generally, and not confined to the case of want of proclamations. And in *Serecold* v. *Hampson*, as reported in 2 *Str.* 1178. where the error assigned was the same as in this case, and the question made was upon what terms the outlawry should be set aside, the court declared their opinion that they had a discretionary power to require it or not. And that though the stat. 31 *Eliz.* was the only act that expressly required bail; yet it was not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. Then if the

(*o*) 12 *Mod.* 545.

taking

1810,

HAVELOCK *against* GEDDES.

taking of bail at all or not be in the discretion of the Court, the form in which the recognizance shall be taken must also be in their discretion. He also referred to *Campbell* v. *Doley* (a), which lays down the rule, that special bail must be put in upon appearing to an outlawry, where special bail was originally required; because it would be unreasonable that the defendant should gain an advantage by standing out till process of outlawry. But, he observed, that if the defendant were only to put in the same bail at last as he would have done at first, he would gain an advantage by the delay. [In answer, however, to a question by the Court, in what form the recognizance was there taken, *Marryat* said that it was in the alternative.] He finally relied on *Mathews* v. *Gibson* (b), and the cases there cited; and observed, in answer to the argument, that a writ of error was a writ of right; that it was only so upon such terms as the law required: and if bail might be required by the Court at common law in this form, the party was not entitled to his writ of error without complying with such requisition when made.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

The question in this case was, whether upon the reversal of an outlawry the bail should enter into a recognizance to satisfy the condemnation money; or whether they should have, as in ordinary cases, the power of rendering the principal. The error assigned was, not the want of proclamations, but a common law error, the defendant's absence beyond sea; so that the case is not

(a) 3 *Burr.* 1920. (b) 8 *East*, 527.

within

within the act 31 *Eliz. c.* 3.; and the defendant appeared in person; so that the case is not within the stat. 4 & 5 *W. & M. c.* 18. *s.* 3. The reversal, therefore, is a common law reversal, for a common law error; and in such a case the Court thinks it has no power to require more than an ordinary recognizance, which leaves the bail at liberty to render. Where the outlawry is reversed, as at common law, it seems to us that the reversal is so far matter of right, that no terms can properly be imposed upon the defendant when it is pronounced. If terms could be imposed, it might be expected they should be noticed upon the record; and yet in no one entry that can be found does the record appear to have noticed them, where the reversal is under the statute of *Eliz.*, the record does notice them; and this furnishes a strong argument that they would be noticed on common law reversals, if on such reversals they could properly be required. In none of the cases cited for the plaintiff, where the bail were required to answer the condemnation money, does the reversal appear to have been by writ of error at common law. In *Serecold* v. *Hampson* it was not; because the outlaw appeared by attorney; and in *Matthews* v. *Gibson* the reversal was *by motion*: and if a party ask of the Court to interfere by motion, where he has no right to their interference but only upon error brought, they may in that case (*i. e.* of reversal by motion) impose upon him what terms they think just. In *Phillips* v. *Warburton*, and *Berwick* v. *Parkins* it does not appear, nor upon inquiry can we discover, in what manner, or on what ground, the outlawries were reversed. As there is no authority, therefore, pointing to the case of a common law reversal in a civil action; and as such reversal seems to us to be in general a matter of right; we are of opinion that no terms can be required upon the reversal, and

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1810.

HAVELOCK *against* GEDDES.

that the recognizance should therefore be in the ordinary form; giving the bail the power of rendering.

Saturday, July 7th.

VERNON *against* KEYS.

The plaintiff being desirous to dispose of his interest in certain buildings, trade, and stock, in which trade he was engaged with the defendant, pending a treaty between them for the purchase by the defendant, the latter falsely and deceitfully represented to the plaintiff, that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that *those persons would not consent to his giving the plaintiff more for his interest than a certain sum*: whereas in truth neither *A.* and *B.*, with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum, and in fact the defendant charged them with a larger price in account for the purchase of the plaintiff's interest. Held that an action on the case did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property, for it was either a mere false representation of another's *intention*, or at most a gratis dictum of the bidder, upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely. But that at any rate the count was bad, in not shewing that the plaintiff had been damaged by such false representation; inasmuch as it was not alleged that the other intended partners of the defendant would have bid at all *without him*, or that *he* would have joined in giving the additional price.

THE Plaintiff declared in case, and stated that he was desirous to dispose of the share and interest which he had in a certain trade and business in which he was engaged at *Stone* in the county of *Stafford* with the defendant in certain buildings, stock in trade, fixtures, &c., and implements of trade belonging to the said business; and that a treaty was pending for the purchase of the same by the defendant: yet the defendant, knowing the premises, but contriving and fraudulently intending to deceive and defraud the plaintiff, while the said treaty was depending, on the 29th of *August* 1803, at *Stone*, &c. falsely, knowingly, and deceitfully represented to the plaintiff, that he (the defendant) was about to enter into partnership, in the said trade or business, with divers other persons, *whose names the defendant would not then and there disclose*, and that *such persons* would not consent to the giving a larger sum to the plaintiff, as the price of his share and interest, than 4500*l.*: whereas in fact, although the defendant was then and there about to enter into partnership with *J. E.* and *J. J.*, yet the said *J. E.* and *J. J.* had not, nor had any other intended partners of the defendant, re-

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fused to give more than the said sum: and whereas the said *J. E.* and *J. J.* had then and there consented and agreed, and were then and there consenting and agreeing, that the defendant should make the best terms he could with the plaintiff, and would have given him a larger sum, to wit, 5291*l* 8*s*. 6d. for the same: and whereas the defendant then and there charged to the said *J. E.* and *J. J.* in their said partnership at and after a larger price, viz. 7291*l*. 8*s*. 6*d*. for the same: by reason of which said false representation of the defendant, the plaintiff was induced to accept and receive, and then and there did accept and receive, the smaller sum of 4500*l*. as the price of his said interest, and was then and there induced to convey and did convey the same for the said price of 4500*l*.: by means whereof the plaintiff lost and was defrauded of a large sum, to wit, 791*l*. 8*s*. 6*d*., which he otherwise might have gotten for the same.

After verdict for the plaintiff upon this, which was the third count of the declaration, at the trial before *Lawrence* J., at *Stafford*, *Williams* Serjt. moved in the last term for a new trial and to arrest the judgment; and the rules were supported on a former day in this term by him and by *Abbott* and *Peake*, and were opposed by *Dauncey*, *Wigley*, and *Puller*. The *Court* were of opinion at the time of the argument that there was no foundation for the objection to the verdict upon the evidence stated; but they then reserved giving their opinion upon the rule for arresting the judgment, till further consideration. The cases cited by the defendant's counsel on the point of law were *Bayly* v. *Merrel* (*a*), where upon an agreement to carry goods at so much per cwt., it was held that an

(*a*) *Cro Jac*. 386. This and other cases were relied on by *Grose* J. in *Pasley* v. *Freeman*, 3 *Term Rep*. 55. whose opinion was also relied on.

action

1810. VERNON *against* KEYS.

action would not lie against the owner for falsely affirming that a load of madder contained a less quantity of cwts. than in fact it contained; because the plaintiff might have detected the falsehood of the affirmation by weighing it. And 1 *Rol. Abr.* 801. *pl.* 16. "If a man, having a term for years, offer to sell it to another, *and says that a stranger would give him* 20*l.* *for it*; by means of which assertion the other buys it, when in truth he was never offered 20*l.* for the term; though he be deceived in the value, yet in truth no action on the case lies. *M.* 40 and 41 *Eliz. B. R.* adjudged." And the same point is stated in *Leakins* v. *Clissel* (*a*). On the other side, they relied on the dictum of *Croke* J. in *Bailey* v. *Merrell* (*b*), that where fraud and damage concur, an action lies for the deceit. And on *Ekins* v. *Tresham* (*c*), where the plaintiff and defendant, being in treaty for the sale of a messuage, the defendant falsely and fraudulently affirmed that it was let at 42*l.* per annum; on the faith of which the plaintiff gave him 500*l.* for it; whereas in truth it was only let at 32*l.* per annum. And though it was urged that the plaintiff might have informed himself of the truth from the tenant; yet it was held that the action lay for the deceit; for perhaps the tenant would not inform the purchaser what rent he gave. And on *Lessney* v. *Selby* (*d*), which is to the same effect. And they referred generally to *Pasley* v. *Freeman* (*e*). At the end of this term

Lord

(*a*) 1 *Sid.* 146. (*b*) 3 *Bulstr.* 95. (*c*) 1 *Lev.* 102.

(*d*) 2 *Ld. Ray.* 1118.

(*e*) 3 *Term Rep.* 51. The two other leading cases upon the same subject, which have occurred since *Pasley* v. *Freeman*, are *Eyre* v. *Dunsford*, 1 *East*, 318. and *Haycraft* v. *Creasy*, 2 *East*, 92. In the first of these there was an allegation of the *knowledge* of the defendant at the time, that the facts affirmed by him were false; which averment was not made in the latter case: and it was also omitted in one of the counts in a subsequent

Lord ELLENBOROUGH C. J. declared the opinion of the Court.

This case stood over that the Court might consider the sufficiency of the third count of the plaintiff's declaration, on which alone he had obtained a verdict. The substance of that count was this, that the plaintiff was desirous to dispose of his share and interest in a certain trade and business in which he was then engaged with the defendant, and in certain buildings, stock in trade, fixtures, utensils, tools, and implements of trade, and other matters of and belonging to the said business; that a treaty was pending for the purchase of the same by the defendant; that while such treaty was depending, the defendant *falsely represented* that he was about to enter into partnership in the said trade or business with certain persons whose names he would not disclose, and that *they* would not consent to the giving more for the plaintiff's share and interest than 4500*l.*: whereas in truth and in fact, although the defendant was about to enter into partnership with one *Emery* and one *Jenkinson*, neither they, nor any other intended partners of the defendant, had refused to give more than 4500*l.*: and whereas *Emery* and *Jenkinson* had consented that the defendant should make the best terms he could with the plaintiff, and

quent case of *Hatchman* v. *Jackson*, M. [illegible] *Geo.* 3 *B. R.* where the verdict had been taken generally: upon which it was moved to arrest the judgment, as well as for a new trial on the merits of the whole case. But *the Court*, after sustaining the verdict on the merits, finally discharged also the rule for arresting the judgment; the counsel for the plaintiff not thinking it worth while to move on the Judge's notes to enter the verdict on the other counts only. And *Lawrence* J. said, that both in *Pasley* v. *Freeman*, and *Haycraft* v. *Creasy*, the cause of action was considered as complete by the fraudulent and false assertion of the defendant, and the injury therefrom to the plaintiff; and it was immaterial whether the defendant *knew* it to be false at the time or not.

would

1810.

VERNON *against* KAYE.

would have given him 5291*l.* 8*s.* 6*d.*: and whereas the defendant charged to the said *Emery* and *Jenkinson* in their said partnership a larger price, viz, 7291*l.* 8*s.* 6*d.*: by reason of which false representation the plaintiff was induced to take 4500*l.* for his said interest, and to convey it for that price: and by means thereof he was defrauded of 791*l.* 8*s.* 6*d.*, which it was alleged he might otherwise have gotten for the same. The defendant insists that this count is bad in law: and on that ground the Court has granted him a rule nisi for arresting the judgment: and upon consideration, we think that the count cannot be sustained, and that the judgment ought to be arrested.

To support the action there must be a fraud clearly alleged to have been committed by the defendant, and a damage resulting from such fraud to the plaintiff. The fraud must consist in depriving the plaintiff by deceitful means of some benefit which the law entitled him to demand or expect. In the present case the fraud is made to consist in the defendant's alleging that his undisclosed future partners "*would not consent to give* more than 4500*l.*" for the subjects of the treaty of purchase. But the words, "*would not consent to give* more than 4500*l.*," may be understood to signify either that such partners *then* would not; which is the same as saying, with reference to the time present, they *will not*; thereby implying that they had *already* refused: and in which sense the words were not true; or, that they *would not thereafter* consent; in which latter prospective sense the words might happen to be true, or not, as they might be thereafter induced to refuse their consent, or not: and if the meaning of the words is thus equivocal, the alleged falsehood of the representation, (upon which the action depends,) is not made

out

1810.

Vernon against Keys.

but wants its proper certainty. Besides, if an action be maintainable for such a false representation of the will and purpose of *another*, with reference to the purposed sale, should not an action be also at least equally maintainable for a false representation of the party's own purpose? But can it be contended that an action might be maintained against a man for representing that *he* would not give, upon a treaty of purchase, beyond a certain sum, when it could be proved that *he had said* he would give much more than that sum. And supposing also he had upon such treaty added, as a reason for his resolving not to give beyond a certain sum, that the property was in his judgment damaged in any particular respect; and supposing further, that it could be proved he had just before the giving such reason said he was satisfied it was not so damaged; would an action be maintainable for this untrue representation of *his own purpose*, backed and enforced by this false reason given for it? And in the case before us, does the false representation, made by the defendant, of the determination of his partners amount to any thing more than a *falsely alleged reason* for *the limited amount of his own offer?* And if it amount to no more than this, it should be shewn, before we can deem this to be the subject of an action, that in respect of some consideration or other existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or

if

if he do so, in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. But is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity, than the price which such proposed buyer offers? I am not aware of any case, or recognized principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely gratis dictum by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequences of which reliance, therefore, he can maintain no action. But if the objection above stated were less tenable than it is, still it is at any rate essential to the action, that the plaintiff should have sustained some damage. The particular damage alleged is in his "not getting 791*l.* 8*s.* 6*d.*, which he might otherwise have gotten for the same." But as it does not appear by any allegation on the record, that the other intended partners would have bought at all *without the defendant*, or that the defendant would have joined with them in giving the price of 5291*l.* 8*s.* 6*d.*, the supposed foundation of the action, in the loss of a price which the plaintiff might otherwise have gotten, fails also. The consequence is, that the judgment must be arrested.

USHER *against* NOBLE.

Saturday, July 7th.

The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy,) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods at the port of delivery, and applying that proportion, (be it a half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the damaged portion of the goods.

THIS was an action upon a policy of insurance subscribed by the defendant for 200*l.* on goods on board the *General Miranda* at and from *Jamaica* to *London*. In the declaration the loss was thus averred—That the ship, having the goods on board, was, in the river *Thames*, and before the discharge of the goods at *London*, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sunk, and the goods thereby totally lost. The declaration also contained the money counts. The defendant pleaded non assumpsit, and paid 14*l.* into court generally upon the whole declaration. And at the trial before Lord *Ellenborough* C. J. at *Guildhall* a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the Court upon this case. (It being agreed that the amount of the damage should be settled by arbitration, if the Court should be of opinion that the plaintiff was entitled to recover any thing beyond the sum paid into court).

On the 4th *Oct.* 18[illegible] the ship *General Miranda* arrived from *Jamaica* with the plaintiff's goods insured on board in the river *Thames*, and anchored near the entrance into the *West India* docks. Shortly afterwards, and as soon as the necessary forms were complied with, the vessel left her anchorage in the river for the purpose of entering these docks, in order to unload her cargo there; but on her near approach, and when about to go through the dock gates, she was wrongfully refused admittance, and ordered back by the servants of the company, under whose

 direction

1810.
Usher against Noble.

direction and management these docks were placed. Upon this she returned back to the river, and endeavoured to regain a place of safety there; but this was found impracticable; and the best thing that could be done was to moor her to a chain near the entrance to the docks, at which several other vessels that had returned from such entrance had previously moored. This was accordingly done, and the *General Miranda*, being the vessel nearest the shore, was at the falling of the tide forced by the violence of the current and pressure of the other ships upon a shoal or bank of the river, and was there bilged and stranded; and, in consequence, a part of the plaintiff's goods consisting of coffee was greatly damaged. In consequence of this the plaintiff brought an action against the *West India* dock company, and recovered a verdict against them for the amount of the loss, *estimated according to the market price of coffee in* London *at the time when the loss took place*, but which was *less than the prime cost of the coffee at* Jamaica. The defendant obtained a Judge's order for liberty to inspect and take copies of the statement of the loss, and the following was delivered as such copy:—

" Statement of average per *General Miranda*, Orr.— *Jamaica* to *London*.

				£.	s.	d.
Amount of goods per invoice No. 1 & 2. and bills of lading No. 3 & 4.				6326	0	1
Insuring £7600 to cover, as under,						
£6750 at 55 gs. per cent.	1063	2	6			
850 " 12 - - -	107	2	0			
7600 Policy - -	19	0	0			
Commission ½ per cent. for effecting - - -	38	0	0			

Carried over

Brought

1810.

Vide Notes.

		l.	s.	d.	l.	s.	d.	l.	s.	d.
								6326	0	1
Brought over					1227	4	6			
Commission ½ per cent. for settling in case of loss					38	0	0			
								1265	4	6
								7591	4	7
Deduct										
Amount of found coffee and wood per invoice No. 5. and landing account No. 6 & 7.					2570	3	2			
Insurance on £3085 to cover, as under,										
£2740 at 15 gs. per cent.		413	11	0						
345	-	43	9	4						
Policy for £3085		7	14	3						
Commission ½ per cent. for effecting		15	8	6						
Ditto ½ per cent. for recovery in case of loss		15	8	6						
					513	11	7			
								3083	14	9
								4507	9	10
Add										
General average per Mr. Parkinson, award No. 8.								189	4	5
								4696	14	3
Deduct										
Proceeds of damaged coffee per A sale, No. 9.					174	12	9			
Carried over										

1810. USHER *against* NOBLE.

						4696	14	3
Brought over			174	12	9			
Recovered from *West India* dock company per statement(a), No. 10.	2741	15	8					
From which deduct Extra law expences	98	18	8					
			2642	17	0			
						2817	9	9
						1879	4	6

If £7600 : 1879 :: £100

Answer, £24 : 14 : 6½ per cent. exclusive of return of premium for sailing in company with armed ship.

The only question at the trial was, by what measure the damage was to be estimated between the assured and the underwriters. The plaintiff contended that he was entitled to such proportion of the prime cost as would correspond with the proportion of the diminution of the market price occasioned by injury which the coffee had sustained; according to the rule laid down in *Lewis* v. *Rucker*, 2 *Burr*. 1169. If this measure should be adopted, the sum paid into court was insufficient. The defendant contended that the case of *Lewis* v. *Rucker* did not apply to

(a) The *West India* Dock Company

To amount of loss on 748 2 10 (Cwt.) damaged coffee, per *General Miranda* averaged per account sales of sound coffee, per said vessel, 430 3 18 of sound coffee having netted 1569*l*. 13*s*. 1*d*.	£2727	4	0
Amount of general average	189	4	5
	2916	8	5
Deduct			
Proceeds of damaged coffee	174	12	9
	2741	15	8

to this case; and that the plaintiff was only entitled to the difference between the actual value of the damaged and sound coffee at the market price in *London*, when the ship arrived; and according to which rule he had received a compensation from the *West India* dock company, who had been the cause of the loss. If the plaintiff were entitled to recover according to the prime cost, it was admitted that the 7*l.* per cent. paid into court was not enough to cover the whole extent of the defendant's liability, the ulterior amount of which was agreed to be settled by arbitration. If the plaintiff were entitled to recover only according to the actual value of the coffee in *London* when the loss took place, the sum paid into court was sufficient to cover the defendant's liability. The question therefore was whether the plaintiff were entitled to recover any thing beyond the sum paid into court? If he were, the present verdict was to stand, and the amount to be settled by arbitration: if not, a nonsuit was to be entered.

This case was argued in the last term, when the rule of calculation insisted on by the plaintiff was maintained by *Abbott*, principally upon the authority of *Lewis* v. *Rucker* (*a*); though that was the case of a *valued*, and this is the case of an *open* policy; but the rule (*b*), he contended, applied in reason equally to both. And he also referred to 2 *Val.* 115. and 2 *Emerigon*, 659. as adopting the same rule of calculation.

(*a*) 2 *Burr.* 1169

(*b*) The rule there laid down was, that the insurer should pay to the insured for the damaged goods the like proportion of the sum at which the goods were valued in the policy, as the price of the damaged goods bore to the price of the sound goods of the same kind when landed at the port of delivery.

1810.
Usher
against
Noble.

Carr, on the contrary, admitting the rule in *Lewis* v. *Rucker*, as applied to valued policies, denied its application to an open policy, such as this is; upon the ground that a policy of insurance being a mere contract of indemnity, the loss which the party sustains by the goods not arriving at the port of delivery is that which they would have neated to him if they had arrived at their port of delivery. And reckoning the sum paid by the *West India* dock company with that which has been paid into court by the defendant, the whole of the plaintiff's actual loss in consequence of the perils insured against would, he contended, be compensated. He put the case thus — Suppose the invoice price of the goods with all charges thereon to be 100*l*. at the loading port; but coming to a falling market at the port of delivery, they are only worth, if found, 80*l*.: but being damaged, they are only worth there 40*l*. If the peril had not happened, the assured would have gotten only 80*l*.: the compensation then to be paid by the underwriter should be 40*l*., whereas the plaintiff seeks to get considerably more. The adoption of such a rule of compensation will hold out a temptation to an assured to procure a partial loss whenever the goods are proceeding to a falling market. But, as Ld. *Mansfield* said in *Hamilton* v. *Mendes* (*a*), an insurer ought never to pay less upon a contract of indemnity than the value of the loss, and the insured ought never to gain more. [*Le Blanc* J. Must not the invoice price be taken as the basis of the calculation in the case of a total loss? And if so, why not in the case of a partial loss?] In the case of a total loss that basis must be taken ex necessitate, because it cannot appear what the value of the goods would have been if they had arrived at the port of delivery: but a partial

(*a*) 2 *Burr*. 1214.

1810.

Usher against Noble.

tial loss is more analogous to the case of general average; and it would be strange that the wrong-doers, by whose fault the loss was occasioned, should pay only according to the actual value at the port of delivery, and that the underwriters on a contract of indemnity should pay more. [Lord *Ellenborough* C. J. According to the rule contended for by the underwriter in this case, he would have had to pay more than the invoice price if the goods had come, as they usually do, to a rising market. The basis of the valuation must be taken either at the port of lading or at the port of delivery. It is in some respects an artificial rule at which ever place it is taken, and not strictly one of indemnity.] The *Consolato del mare*, the oldest modern code of maritime law, says that the amount of the loss is to be taken at the price of the goods at the port of delivery, if the voyage were half performed at the time. [Lord *Ellenborough* C. J. That was a rule positivi juris; I do not mean to say an unjust one. His Lordship observed that it did not appear that *Johnson* v. *Sheddon* (*a*) was the case of a valued policy.]

Abbott in reply relied on the general and more certain convenience of the rule laid down in *Lewis* v. *Rucker*. And he also referred to *Dick* v. *Allen* at *Guildhall* after *Mich. T.* 1785 (*b*), where in an action upon a policy of insurance to recover an average loss upon goods, *Buller* J. observed, that whether the goods arrived at a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price.

(*a*) 2 *East*, 581.

(*b*) *Park*, 139. 6th edition. Mr. *Park* now observed that that was the case of an open policy. And see *Tuite* v. *The Royal Exchange Assurance Company*, at *Guildhall*, after *Trin.* term 1747. before Lord C. J. *Lee*. *Ib.* 138.

1810.
Usher against Noble.

Lord Ellenborough C. J. As the Court will have to promulgate a rule, which will bind in future in similar cases, it will perhaps be more willingly acquiesced in if delivered upon more mature deliberation: we will therefore take further time before we give our opinion. The question will be whether every case be not in effect the case of a valued policy so far as it involves this consideration, and consequently within the rule laid down in *Lewis* v. *Rucker*. Where the parties have put an express valuation on the subject matter of the insurance, that rule is admitted to govern; and the question is whether general usage has not established the invoice price as the basis of the value in all other cases where the policy is open. Some rule there must be, and I rather think that the one laid down in *Lewis* v. *Rucker* was adopted as being upon the whole the most convenient in all cases.

The case stood over for further consideration till this term, when his Lordship delivered the opinion of the Court.

It is admitted that the assured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated is the question. In the case of a valued policy, the valuation in the policy is the agreed standard: in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard; as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an

owner

owner of goods who has increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case; i. e., it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, i. e., to the invoice price, being itself calculated as before stated; and you then get the 1-half, the 1-4th, or 1-8th of the loss to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery: but the assured may obviate this inconvenience by making his policy a valued one; or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions I have mentioned, as the standard of value for this purpose. In this case, after receiving the money paid by the *West India* dock company, the assured is left short of his full reimbursement (even on the defendant's own calculation) by the premiums of insurance at 15 guineas per cent, commission, and extra costs of suit, for which no allowance was made by the *West India* dock company: so

that

1810.

UNDER *against* NOBLE.

that quacunque via data, the 5l. per cent. paid into court is too little. The consequence is that the verdict must stand, subject to the reference of account to an arbitrator, as agreed by the case.

Saturday, July 7th

LIVIE *against* JANSON.

An *American* ship insured from *New York* to *London*, *warranted free from* American *condemnation*, having, for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind, and tide driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards, with great difficulty and expence, got off and finally condemned by the *American* government for breach of the embargo. held that as there was ultimately a *total* loss by a peril *excepted out of the policy*, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the assured: aliter, in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss; which appear to be covered by the general authority given to the assured to "labour and "travail, &c. for the defence, safeguard, and recovery of the property insured."

THIS was an action upon a valued (*a*) policy of assurance, lost or not lost, upon the ship *Liberty*, with or without papers and clearances, at and from *New York* to *London*; the adventure to begin at *New York* on the 23d *December* 1808, for a premium of 18 *guineas* per cent.; and the insurance was declared to be on ship and cargo *warranted free from* American *condemnation*. The declaration contained the usual averments, and alleged the interest to be in *B. Byles*, and the loss *by perils of the seas*. At the trial before Lord *Ellenborough* C. J. at the sittings after last *Hilary* term, a verdict was found for the plaintiff for 200*l*., subject to the opinion of the Court on the following case.

The policy was subscribed by the defendant on the 27th of *February* 1809, and the insurance was effected in consequence of a letter of advice from *New York*, that the ship would sail, notwithstanding an embargo then enforced by the government of *America*. Which letter was laid before the underwriters at the time of effecting the

(*a*) It was agreed in the course of the argument that this was a valued policy, but it was not stated to be so in the original case.

policy,

1810.

[illegible] against [illegible].

policy. The usual premium from *New York* to *London* is 8 guineas. The ship being the property of *B. Byles* was in safety in the North River at *New York* on the 23d of *December* 1808, loaded with a valuable cargo on his account, destined for *London*, and waiting an opportunity of eluding the embargo. For this purpose she sailed with a pilot on board between 7 and 8 o'clock in the night of the 15th *January* 1809; and in passing from *New York* to *Governor's Island*, towards the *Jersey* shore, being the proper course of her voyage, a large body of ice, brought down the river by the tide and wind, drove against the ship with considerable force, and carried her ashore among some rocks on *Governor's Island*. Every exertion was made by the master and crew to get the ship off, but without effect. It was found that a large hole was made in her side by the ice, and another in her bottom by the rocks. In consequence of this, the water rose four feet in the hold, and the ship fell down on her side as the tide left her. In this state the master and part of the crew left the ship at 11 o'clock at night in one of the boats: the mate and the remaining part of the crew continued on board till five in the morning, and then left her in the long-boat, in the condition above described. On the same morning about 6 o'clock, the officers of the *American* custom-house, having discovered the ship, proceeded to seize her; and the ship and cargo were finally condemned for breach of the embargo. The cargo sustained damage exceeding 5*l.* per cent. by the accident, and the ship and tackle sustained damage exceeding 3*l.* per cent. A great number of persons were employed by the *American* government to take out the cargo and to weigh up the ship; which was effected by great exertions in the course of six weeks. If the plaintiff were not entitled to recover, the verdict

1810.

LAVIE *against* JANSON.

verdict was to be set aside, and a nonsuit entered: if he were entitled to recover as for a total loss, the verdict was to stand: if for an average loss, the parties agreed to settle the amount by reference.

Scarlett, for the plaintiff, contended that the seizure and condemnation by the *American* government were not the operative cause of the loss, but only *consequences* of that loss which had before been occasioned by the perils of the sea, and by which a right of action was vested in the plaintiff, to recover the amount from the underwriters. The only effect of the seizure was to deprive the underwriters of their benefit of salvage; but that did not make it cease to be a total, or if not a total, at least an average loss. And he referred to *Barker* v. *Blakes* (*a*), where the goods of a neutral were insured on board a neutral ship bound upon a lawful adventure from his own to the enemy's country; and the ship, being off the enemy's port, was brought into a *British* port by a *British* cruizer, for the purpose of search; and after condemnation of the enemy's goods found on board her, was liberated, together with the neutral cargo on boord. There, though the detention and bringing into a *British* port for a lawful purpose by the *British* cruizer was not a peril for which the underwriter was originally and directly liable; yet as the loss of the voyage was a consequence of that peril, it was held that the assured might recover as for a total loss, if he gave notice of abandonment in time, or for an average loss, if his notice were out of time. Admitting that the intention of eluding the embargo increased the sea risks, because she was to sail in the night, and without waiting for the best wind, and without the choice of putting back

(*a*) 9 *East*, 283.

or

or the chance of ſalvage, in caſe of an accident in getting to ſea; yet all theſe additional riſks were compenſated to the underwriter by the increaſe of the premium. The ſhip, it appears, was a complete wreck at the time of the ſeizure, for with all the aſſiſtance which the *American* government could command, it was ſix weeks before ſhe could be weighed up, and that at an expence which probably no individuals would have incurred. If both theſe parties had been upon the ſpot, and the aſſured had abandoned immediately, it cannot be diſputed but that the ſubſequent ſeizure would not have altered the caſe: then the want of notice at the time ought not to put him in a worſe condition; at leaſt it ought not to deprive him of the benefit of a partial loſs, the value of which may be eſtimated before the ſeizure took place.

Barnewall, contrà, inſiſted that this was the caſe of a total loſs, not by the perils of the ſea, but by the ſeizure of the *American* government; which peril is excepted out of the policy, and therefore that the aſſured was not entitled to recover at all, either as for a total or a partial loſs. He referred to *Green* v. *Elmſlie* (a) as in point againſt a total loſs by the perils of the ſea: for there the ſhip, inſured againſt capture only, was driven by a gale of wind on the enemy's coaſt, and there captured; which was contended to be a loſs by the perils of the ſea and not by capture: but Lord *Kenyon* C. J. held it was clearly a loſs by capture; for had the ſhip been driven on any other coaſt than that of an enemy, ſhe would have been ſafe. Neither can the plaintiff recover as for a partial loſs; for the loſs in its nature is total, though not by a peril inſured

(a) Sittings after *Hil.* 34 *Geo.* 3. *Peake's N. P. Caſ.* 212.

againſt

against. The assured has not in fact and in the event been damnified by the perils of the sea; for the goods, in whatever degree damaged have been lost to him altogether by an event against which he was not insured: the previous damage therefore became wholly unimportant to him: the partial loss, if any, was in truth sustained by the *American* government, and not by the assured. The case of *Shawe* v. *Felton* (*a*) shews that the previous state of the thing insured signifies nothing if at last there happen a total loss of it by an event insured against. [*Bayley* J. observed that that was the case of a valued policy: *Barnewall* answered that this was in fact the same, though it were not so stated in the case; and *Scarlett* admitted that it was so.] All that an underwriter engages to do is to put the assured in the same state at the end of the voyage as he would have been in, if the particular peril insured against, by which the loss is immediately occasioned, had not happened. Now here, as the whole was ultimately seized and condemned by the *American* government, it is precisely the same to the assured as if the previous stranding had never happened. Though in *Godsal* v. *Boldero* (*b*) there was a certain loss to the assured, yet as that loss was done away (in that instance by a collateral compensation) at the time of the action brought, the plaintiff could not recover.

Lord Ellenborough C. J. As there is some novelty in the point, we will look further into it; though as it appears to me this case falls within the general principle, that, causa proxima et non remota spectatur. It therefore seems to me useless to be seeking about for odds and ends of previous partial losses which might have hap-

(*a*) 2 *East*, 108. (*b*) 9 *East*, 72.

pened

pened to a ſhip in the courſe of her voyage, when at laſt there was one overwhelming cauſe of loſs which ſwallowed up the whole ſubject-matter. At preſent I own the caſe appears to me to be neither an average nor a total loſs within the terms of the policy. But we will conſider further of it.

The caſe ſtood over till the end of the term, when his Lordſhip delivered the judgment of the Court upon it.

This was an action on a policy on ſhip and goods, *warranted free from* American *condemnation*. The ſhip and goods were damaged by the perils of the ſeas, and were afterwards ſeized by the *American* government, and condemned: and the queſtion is whether the total loſs by ſubſequent ſeizure and condemnation takes away from the aſſured the right to recover in reſpect to the previous partial loſs by ſea-damage? And upon conſideration, we think that it does. It is to be recollected that nothing is properly imputable to the ſea-damage but the deterioration of the ſhip and cargo; for though ſuch ſea-damage might ſtop the progreſs of the voyage, and ſo bring the ſhip and cargo within the reach and effect of ſome other diſtinct peril which they might otherwiſe have eſcaped, yet the ſubſtantive loſs by that latter peril is imputable to ſuch latter peril only, not to the previous ſea-damage. If for inſtance a ſhip meet with ſea-damage, which checks her rate of ſailing, ſo that ſhe is taken by an enemy from whom ſhe would otherwiſe have eſcaped; though ſhe would have arrived ſafe but for the ſea-damage, the loſs is to be aſcribed to the capture, not to the ſea-damage; and this upon the principle that cauſa proxima non remota ſpectatur. The caſe of *Green* v. *Elmſlie*,

which was cited in the argument, proceeds upon a similar principle: there, the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture and not to the perils of the seas, which had driven the vessel within the influence of the peril of capture. Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is *ultimately no damage* to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? To put another instance to the same effect: supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? And if the property, whether undamaged or not, would have been equally annihilated; is not its previous deterioration rendered wholly immaterial? The object of insurance is that the thing insured shall arrive safe at the place of destination, and that if it do not arrive at all, in consequence of any of the perils insured, the assured

1810.

LIVIE *against* JANSON.

ſured ſhall recover as for a total loſs: and that if it arrive damaged, a proportionable compenſation ſhall be paid for the damage; becauſe in that caſe the proprietor receives the thing pro tanto in a worſe condition than he ought to have done: but of what conſequence to him is the intermediate condition of the thing, if he be never to receive it again? If, before the completion of the voyage, it be, as to him and his intereſts, in a ſtate of utter annihilation, what is it to him whether it had been damaged or not in an anterior part of the voyage, before it became annihilated? It was truly ſaid in the courſe of the argument that the *American* government were the only perſons in this caſe who were prejudiced by the deteriorated ſtate of the ſhip and cargo: they obtained it in a leſs valuable condition on that account than it would otherwiſe have been to them: but that is their loſs, not that of the plaintiffs. There may be caſes in which, though a prior damage be followed by a total loſs, the aſſured may nevertheleſs have rights or claims in reſpect of that prior loſs, which may not be extinguiſhed by the ſubſequent total loſs. Actual diſburſements for repairs in fact made, in conſequence of injuries by perils of the ſeas prior to the happening of the total loſs, are of this deſcription; unleſs indeed they are more properly to be conſidered as covered by that authority, with which the aſſured is generally inveſted by the policy, of "ſuing, labouring, and travailing, &c., for, in, and about the defence, ſafeguard, and recovery of the property inſured:" in which caſe the amount of ſuch diſburſements might more properly be recovered as money paid for the underwriters under the direction and allowance of this proviſion of the policy, than as a ſubſtantive average loſs to be added cumulatively to the total loſs which is after-

1810.
LIVIE against JANSON.

wards incurred in consequence of the sea-risks. In the present case, as the immediately operating cause of total loss was one from which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practicably called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion that such prior partial injury forms in this case no claim upon the underwriters of this policy; and consequently that the postea must be delivered to the defendant.

Saturday, July 7th.

WILLIS *against* FREEMAN and Others.

A trader having securities in his bankers' hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount on the score of his *accommodation*, payable to his own order, which, after acceptance, he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it *the amount of the sum accepted for the accommodation of* the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they were liable to account another in form of action (not on the bill) to the bankrupt's assignees.

THE plaintiff declared, that on the 5th of *July* 1809 one *James Anderson* drew a bill of exchange on the defendants, whereby he directed them on the 10th of *November* in that year to pay to his order 1400*l.*; that the defendants accepted the bill, and that *J. Anderson* then on the same day indorsed it to the plaintiff; and that the defendants have since refused to pay it. There were also the common counts. The cause was tried before Lord *Ellenborough* C. J. at *Guildhall*, after *Hilary* term 1810, when the plaintiff obtained a verdict for 1434*l.* 14*s.* 2*d.*,

 subject

subject to the opinion of this Court on the following case.

Anderson being indebted to the plaintiff in more than 2000*l.*, an action was brought to recover the same, which stood for trial at the sittings after *Trinity* term 1809. After notice of trial was given, *Anderson*, being then insolvent, represented to the plaintiff's attorney that he was unable to pay the whole of his debts, and proposed that if the proceedings in that action were stayed, he would pay him a composition of 13*s.* 6*d.* in the pound upon the debt claimed, and the costs of the action, to fall due on the same day on which the plaintiff would be entitled to sign judgment in the action; and he named the defendants as his sureties for the same, and proposed to give their acceptance. This proposal being accepted, *Anderson* applied to the defendants by the following letter, to accept the bill in the declaration mentioned *for his accommodation.* (Dated *Cannon-street*, 5th *July* 1809.) " Messrs. *Freeman* and Co. We should be much obliged, " and feel considerably accommodated, if you would " accept our bill drawn on you for about 1400*l.* payable " at 4 months after this date, (which will not be negoci- " ated;) and what part of this bill is not covered by bills " in your hands we shall very soon do. This is the last " time we shall have occasion to trouble you for accom- " modation, &c. as we shall get over in the course of a " couple of months the inconvenience we thus suffer " through Mr. *Newman*: for although our loss by his " bankruptcy will be very little or nothing, yet our ad- " vances are heavy and unexpected. We remain, &c. " *James Anderson* and Co." The defendants accepted the bill, and delivered it to *Anderson*, who indorsed it, so accepted, to the plaintiff on the next or the second fol-

1810.

Willis *against* Freeman.

lowing day. At the time the defendants accepted the bill, they had funds of *Anderſon* in their hands to the amount of 888*l.* 16*s.* 8*d.*, conſiſting of bills not then due, but ſince paid, and which were depoſited by him with the defendants as his bankers. *Anderſon* being a trader committed an act of bankruptcy on the 7th of *March* 1809, and a commiſſion iſſued againſt him on the 25th of *July*, on which he was afterwards declared a bankrupt, and aſſignees appointed. The queſtion was, whether the plaintiff were entitled to recover any and what ſum? If he were entitled to recover the whole, the verdict was to ſtand: if entitled to recover no more than the difference between 888*l.* 16*s.* 8*d.* and the amount of the bill, then the verdict was to be entered for a ſum ſo reduced: if not entitled to recover any thing, the verdict was to be ſet aſide and a nonſuit entered.

The caſe was argued a few days ago by *Scarlett* for the plaintiff, and *Holroyd* for the defendants; but the Court in giving judgment went ſo fully into the grounds of the arguments, that it is unneceſſary to ſtate them here. After time taken to conſider the caſe further,

Lord Ellenborough C. J. delivered the opinion of the Court.

This was an action againſt the defendants as acceptors of a bill of exchange for 1400*l.*, drawn by one *Anderſon*, payable to his own order, and indorſed by him to the plaintiff for value. And the defence was that in conſequence of a prior act of bankruptcy by *Anderſon*, which has ſince been followed by a commiſſion, *Anderſon's* indorſement transferred no right to the plaintiff. As the bill was payable, not immediately to the plaintiff, but

1810.

WILLIS *against* FREEMAN.

but to *Anderson*'s order, it was incumbent on the plaintiff when he took the bill to satisfy himself as to *Anderson*'s right to indorse it; and if *Anderson* had no such right, the loss must fall upon the plaintiff. At the time this bill was accepted the defendants had in their hands, as *Anderson*'s bankers, bills of the value of 888*l.* 16*s.* 8*d.*, not then become due; but they had no other effects. To that amount, therefore, their acceptance was *for value*; beyond that, it was gratuitous, and merely for *Anderson*'s *accommodation*. It may be considered as clear that, except in cases provided for by particular statutes, a trader who has committed an act of bankruptcy, upon which a commission afterwards issues, can make no transfer of his property to the prejudice of his assignees, nor do any act to interfere with their rights; but every such attempted transfer or act is liable to be vacated by his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy has the same effect as the act of any other person. The question, therefore, for consideration here is, whether this indorsement by *Anderson*, if allowed to be effectual, could prejudice his assignees or interfere with their rights; because, as far forth as it would do so, it is inoperative. The case of *Wilkins* v. *Casey*, 7 *Term Rep.* 711. has established, that if a man who has funds in his hands belonging to a trader, who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds when the bill becomes due to the discharge of his own acceptance, though a commission of bankrupt may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied. To the extent therefore of the 888*l.* 16*s.* 8*d.*, it would prejudice the

1810. WILLIS *against* FREEMAN.

assignees to hold this indorsement valid; because it would destroy the claim of the assignees to that sum in the hands of the acceptors; and we have no difficulty in saying, that *this part* of the plaintiff's demand cannot be supported.

As to the surplus (511*l.* 3*s.* 4*d.*), had the bill been for that sum alone, the case cited by the plaintiff of *Arden* v. *Watkins*, 3 *East*, 317. would be an authority in point, unless the late statute (49 *Geo.* 3. *c.* 121. *s.* 8.) has altered the law in this respect. The principle decided in *Arden* v. *Watkins* was this, that if a man accept a bill for the *accommodation* of a trader who has committed a secret act of bankruptcy; and such bill be payable to the trader's order, the trader's indorsee will have a valid claim upon the bill against the acceptor, notwithstanding a commission of bankrupt shall have issued against such trader before the bill became due; because as the trader himself could have had no right upon such bill against the acceptor, his assignees, who can in this respect stand in no better situation than the bankrupt whom they represent, could have had no right upon it, supposing it had remained in his possession; and therefore his indorsement works no prejudice to them. It is contended, however, in this case, first, that where the acceptance is partly for value, and in part only by way of accommodation, the assignees have an interest in the bill, and a right, pro tanto, to sue upon it; and that to allow the indorsement to operate upon the surplus would prejudice their right, and would be subjecting the acceptor to two actions upon the same acceptance, which is not allowable: and secondly, that since the stat. 49 *Geo.* 3. *c.* 121. *s.* 8., if the defendant were compelled to pay this 511*l.* 3*s.* 4*d.* to the plaintiff, he, the defendant, as a surety for a bankrupt, paying under the circumstances stated in that 8th section, would be

be entitled to prove his demand in respect of it under *Anderson*'s commission, and the assignees and other creditors would receive a prejudice from that proof. A moment's consideration, however, will dispose of the second ground; it being clear that the quantum of proof against the estate will not be varied by the defendants' proving, (if they should be admitted to prove) and consequently their proof could not prejudice the assignees or other creditors. If the plaintiff recover this sum from the defendants, (and we will suppose the defendants are competent to prove for it,) in that way it is proved by the defendant under the bankrupt's commission: if the plaintiff do not recover it from the defendants, he, the plaintiff, may certainly prove it himself, as part of the debt due from *Anderson* to himself at the time when *Anderson* became bankrupt; and in either case, therefore, will it be either by one party or the other once proveable. As to the other ground, we think the assignees had no right to the bill *in opposition to the plaintiff*, nor any right to sue upon it for the 888*l.* 16*s.* 8*d.* It was a security from the defendants for that sum and more; and though the assignees had a right to take care that the bankrupt should not use it so as to affect that sum, they had no right to control his power over it as to the residue beyond that sum. They have a right to protect themselves, but not arbitrarily to interfere with or vary the rights of others. The possession of this bill would have placed them in no better situation than they would have been in without it: with the possession of it, they could only have recovered the 888*l.* 16*s.* 8*d.*; and without it, they may still recover to that same extent. Before this bill was drawn, and independently of it, this 888*l.* 16*s.* 8*d.* was theirs: the acceptance of this bill gave them no fresh right; it merely left the old one as is was.

They

1810.

WILLIS *against* FREEMAN.

They are entitled to say that the 888*l.* 16*s.* 8*d.* shall not be touched: they may resist and disaffirm any operation of this bill to transfer that sum to their prejudice; but they have no further right. This is all that is necessary for their protection; and it would be working injustice without any reasonable colour or ground for it to give them more. The assignees, indeed, do not themselves controvert the plaintiff's right; their right is insisted upon by the defendants; they set up the jus tertii; and they set up that right, not to protect the assignees, but to reduce the extent of their own responsibility. The assignees will have every thing to which they are entitled, independently of this bill; and that, whether the plaintiff recover upon it to the extent of the 511*l.* 3*s.* 4*d.*, or not. The defendants entered into an engagement, by which, for any thing which they then knew, *Anderson* might pledge his responsibility for 511*l.* 3*s.* 4*d.* beyond what he had assets to cover. They agreed, in effect, to apply the 888*l.* 16*s.* 8*d.* towards the discharge of the bill; and if necessary to advance 511*l.* 3*s.* 4*d.* more of their own. *Anderson*, at the time of indorsing the bill to the plaintiff, had apparently the right to indorse it: he had, indeed, committed a secret act of bankruptcy, but that was unknown to the plaintiff, and no commission had issued against him. The plaintiff had therefore a right to suppose that he was receiving a valued engagement from the defendant for 1400*l.*: the defendants, if they knew of the indorsement, must have so considered it; and is it just to allow the defendants to withdraw themselves from the *whole* engagement, because it would interfere with the rights of the assignees, unless they were relieved from a part of it? If the defendants' argument prevail, it would have prevailed equally if their debt to *Anderson* had been 6*d.* only, instead of

6 888*l.*

888*l.* 16*s.* 8*d.* If the bill is to be confidered fo completely indivifible as that the plaintiff can recover no part unlefs he recover the whole, the right to refift his claim to the extent of a fingle farthing would defeat it in toto. Could not the affignees wave their right, and affirm *Anderfon*'s indorfement? And if they did, could the defendants refift payment of the whole 1400*l.*? And if not, how can their conduct, in affirming or difaffirming the act, be allowed to vary the extent of the defendants' liability. This is not the cafe of a profeffed indorfement of part of the bill, which would have the effect of giving feveral actions on the bill; but it is an indorfement of the whole, fuppofed at the time to be valid for the whole, but which, from fubfequent events, the defendants are at liberty to refift and vacate for a part; and upon payment of which part, they are difcharged from all *further refponfibility upon the bill*, though they ftill continue anfwerable for the refidue of its amount to others, in another form, and upon a ground wholly independent of the bill. Upon the whole, therefore, as the defendants by their acceptance enabled *Anderfon* to hold forth the bill as a pledge for 1400*l.*; as *Anderfon* has no ground of his own to refift his liability to the whole of the fum, but is obliged to call in aid the right of third perfons, the affignees; as they have a right to the extent of 888*l.* 16*s.* 8*d.* only, and will have a complete protection if that fum be excluded from the verdict; and though the plaintiff be at the fame time allowed to retain the poffeffion of the bill, and to recover upon it pro tanto; it appears to us that the plaintiff is to be confidered as having a right to recover fuch balance of 511*l.* 3*s.* 4*d*, and that the verdict ought therefore to be entered for him for fuch reduced fum accordingly.

1810.

Friday, July 6th.

A bankrupt, sued by his surety, or person who was liable for his debt, at the time of the commission issued against him, though the surety became such after the act of bankruptcy, and paid the debt after the issuing of the commission, cannot, without specially pleading it, in like manner as after the stat. 5 *Geo.* 2. c. 30. *s.* 7., avail himself of his certificate under the stat. 49 *G.* 3. *c.* 121 *s.* 8., which *discharges* the bankrupt having his certificate of all such *demands*, at the suit of every such person, *in like manner to all intents and purposes*, as if such person had been a creditor before the bankruptcy.

STEDMAN *against* MARTINNANT.

THE plaintiff declared in assumpsit upon the common money counts; to which non assumpsit was pleaded; and at the trial before Lord *Ellenborough* C. J. in *Middlesex*, a verdict was found for the plaintiff for 260*l.*, subject to the opinion of the Court on the following case.

On the 5th of *January* 1807 the plaintiff, at the defendant's request, and for his accommodation, accepted a bill of exchange drawn by the defendant for 234*l.* 11*s.* 0*d.*, payable at 70 days after date, and the defendant promised to provide the plaintiff with the money to pay such bill. The bill became due on the 19th of *March* 1807, and, the defendant not providing for it, was dishonored. On the 18th of *March* 1807 a docket was struck, and on the 21st a commission of bankrupt was issued against the defendant, which was superseded on the 15th of *April* 1807; on which day another commission of bankrupt was issued against him; but neither of these commissions was gazetted or proceeded upon. A meeting of the defendant's creditors was then held, and time was given to him to pay his debts by instalments. On the 9th of *June* 1807 the plaintiff accepted another bill, for the like accommodation of the defendant, for 23[illegible]*l.* 11*s.* 10*d.*, which became due on the 12th of *September* 1807, and was on that day paid by the plaintiff for the defendant's use, he not providing for the same. This latter bill was given for the purpose of taking up the former dishonored bill, with the addition of interest and stamp, and was indorsed by *C. Aldrick* as an additional security to Messrs. *Herries* and Co., the holders of the

former

former bill, who had required the ſame. A commiſſion of bankrupt iſſued againſt the defendant, dated 6th of *Auguſt* 1807, founded on an act of bankrupt committed in *March* 1807, and the defendant was declared a bankrupt under ſuch commiſſion. A dividend of 6*s.* 4*d.* in the pound was declared and made on the 6th of *Auguſt* 1808. A ſecond dividend of 1*s.* 6*d.* in the pound was declared and made on the 28th *July* 1809. Previous to paying the laſt dividend the aſſignees had in hand 1547*l.* belonging to the defendant's eſtate; and the plaintiff, (ſuppoſing him entitled to prove the money paid on the bills as a debt,) and other creditors of the defendant who had not proved under the ſaid commiſſion, might at that time have received dividends equally in proportion to their reſpective debts, without diſturbing any dividend then already made. The defendant obtained his certificate of conformity under the ſaid commiſſion on the 4th of *September* 1809. The queſtions were, 1ſt, whether the plaintiff were entitled to recover the 260*l.* (*a*), notwithſtanding the defendant's bankruptcy and certificate. 2dly, Whether the defendant can avail himſelf of his certificate under the general iſſue.

Puller, for the plaintiff, ſaid that the laſt queſtion had been decided in the preſent term by the court of *C. B.*, in *Gaſkell* v. *Martinnant*, where it had been held that the bankrupt could not avail himſelf of his certificate upon the late act of the 49 *Geo.* 3. *c.* 121. *ſ.* 8. without pleading it, in the ſame manner as he muſt have done before that act, where the debt accrued before the bankruptcy.

That ſection enacts, « that in all caſes of commiſſions « of bankrupt already iſſued, under which no dividend

(*a*) The amount of the ſecond bill with intereſt.

« have

1810.

STEDMAN *against* MARTINNANT.

" has yet been made, or under which the creditors who " have not proved can receive a dividend equally in pro- " portion to their respective debts, without disturbing " any dividend already made, and in all cases of commis- " sions of bankrupts hereafter to be issued, where at the " time of issuing the commission any person shall be " surety for or be liable for any debt of the bankrupt, " it shall be lawful for such surety or person liable, if he " shall have paid the debt, or any part thereof in dis- " charge of the whole debt, although he may have paid " the same after the commission shall have issued, and the " creditor shall have proved his debt under the commis- " sion, to stand in the place of the creditor as to the di- " vidends upon such proof; and when the creditor shall " not have proved under the commission, it shall be law- " ful for such surety or person liable to prove his demand " in respect of such payment as a debt under the com- " mission; not disturbing the former dividends, &c.; " notwithstanding such person may have become surety " or liable for the debt of the bankrupt after an act of " bankruptcy had been committed by such bankrupt: " provided that such person had not at the time when he " became such surety, or when he so became liable for " the debt of such bankrupt, notice of any act of bank- " ruptcy by such bankrupt committed, or that he was " insolvent, or had stopped payment. Provided always, " that the issuing a commission of bankrupt, although " such commission shall afterwards be superseded, shall be " deemed such notice. And every person against whom " any commission of bankrupt has been or shall be " awarded, and who has obtained or shall obtain his cer- " tificate, *shall be discharged of all demands*, at the suit of " every such person having so paid, or being hereby " enabled to prove as aforesaid, or to stand in the place

" of

" of fuch creditor as aforefaid, with regard to his debt in " refpect of fuch furetyfhip or liability, *in like manner,* " *to all intents and purpofes,* as if fuch perfon had been " a creditor before the bankruptcy of the bankrupt for " the whole of the debt in refpect of which he was furety " or was liable as aforefaid."

The Court, without entering into the firft queftion, called on the defendant's counfel for an anfwer on the fecond point.

E. Lawes who appeared now on the part of the defendant, admitted that the cafe cited was an authority in point againft him, which had been decided fince this cafe was referved: but requefted the indulgence of the Court to let the cafe ftand over till to-morrow, on account of the unavoidable abfence of the gentleman who was to have argued it for the defendant.

Lord ELLENBOROUGH C. J. then faid that it was a rule very much of practice to require a bankrupt to plead his certificate, if he meant to avail himfelf of it; but it had long prevailed before the late act of parliament; and having been recently extended by the judgment of the court of *C. B.* to cafes of this kind arifing fince the act, it would be very inconvenient if a different rule were eftablifhed in this court. They fhould therefore confider themfelves bound by that decifion, unlefs it could be fhewn to be an improvident rule, fo as to induce them to confer with the judges of the other court upon it. For the prefent, therefore, the Court would give judgment nifi for the plaintiff; which would ftand, unlefs they heard any fufficient reafon urged to-morrow to the contrary.

Marryat,

1810.

STEDMAN *against* MARTINNANT.

Marryat, for the defendant, on the next day suggested that the stat. 5 *Geo.* 2. *c.* 30. *s.* 7. which gave a summary form of plea to a certificated bankrupt sued for a debt accruing before the bankruptcy, by which he was to avail himself of his discharge by the certificate, was framed upon the ground that the remedy only was barred and not the debt. But here, he contended, that by the last statute the demand itself, which was the debt, was discharged, and the very cause of action was barred, and therefore the defence was available on the general issue.

The Court, however, were clearly satisfied that there was no foundation for this distinction; but they offered *Marryat* leave to amend on payment of costs. And he desired time to consult his client till the next day.

Postea to the plaintiff.

Monday, July 9th.

GILDART *against* GLADSTONE and GLADSTONE, in Error.

Judgment having been given in C. B for the plaintiffs upon a special verdict in assumpsit, which was reversed upon writ of error in this court, the defendant is entitled here not only to judgment of acquittal, but also *for* *the costs of his defence in* C. B., being the same judgment which the Court below ought to have given; the defendant in such case being entitled to his costs by the stat. 23 *H.* 8. *c.* 15.

THE judgment of the court of *C. P.* for the plaintiffs below having been reversed in this case(*a*), and a rule drawn up thereupon; *Holroyd*, in the last term, obtained a rule calling upon the defendants in error to shew cause why the rule made before for reversing the judgment should not be amended, by adding thereto, that judgment of acquittal be given for the plaintiff in error, *with the costs*

(*a*) In *M.* 50 *Geo.* 3. 11 *East*, 675.

of his defence in the court of C. P.: and why the master of this court should not tax those costs. But he admitted that he could not have the costs of the writ of error here; as this court could only give the same judgment on a writ of error as the court of *C. P.* ought to have given, according to the judgment of the House of Lords in *Phillips* v. *Bury* (*a*). He referred to the stat. 23 *H.* 8. *c.* 15. which gives costs to a defendant if a verdict pass against the plaintiff in certain actions, of which this was one: and here in the result it appears, by the judgment of the Court, that the verdict, which was special, should have been entered for the defendant below.

Richardson now opposed the rule; and in answer to a question put by Lord *Ellenborough* C. J. whether the court of error ought not to perfect their judgment by giving that relief to the defendant below which the the Court below ought to have given to him; he referred to *Parker* v. *Harris* (*b*) where a distinction is taken, "that where judgment is given below for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment; for the suit is only to be eased and discharged of that judgment: but where the plaintiff below brings error, the judgment shall not only be a reversal, but the Court shall also give such judgment as the court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit." The same rule was recognized and acted upon in *Baker* v. *Lade* (*c*). It is true that those cases were upon demur-

(*a*) 1 *Ld. Ray.* 10. and *Salk.* 403. (*b*) 1 *Salk.* 262.
(*c*) *Carth.* 254.

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rer, and before the ftatute 8 and 9 *W*. 3. *c*. 11. *f*. 2., giving cofts to a defendant obtaining judgment on demurrer: but *Phillips* v. *Bury*, in which the fame rule was recognifed, was upon a fpecial verdict. If it be faid that one of the reafons there given for the diftinction is that the defendant who obtains, upon error brought, the reverfal of a judgment given againft him below is *in ftatu quo*, and therefore has no need to enter a new judgment; and that fince the ftatute giving him cofts that reafon no longer applies: the anfwer is, that the fame diftinction has been recognized in cafes and books of practice long fince the ftatute of *William*; of which he inftanced feveral (*a*). [*Bayley* J. Is not that contrary to the rule, as laid down in *Salk.* 401. and 7 *Mod.* 3. *Anon*, *E.* 1 *Ann. B. R.* (*b*).]

Holroyd and *J. Clarke*, in fupport of the rule, obferved that in general where a defendant brings a writ of error it is for fome fault in the declaration after verdict and judgment againft him, for which he ought to have moved in

(*a*) 2 *Tidd*, 1163. (2d edit.) cites 1 *Salk.* 261. 401. 4 *Mod* 76. 4 *Burr.* 2156. 2 *Bac. Abr* Error, *M* 2 which latter, (5th edit.) alfo refers to *Pugh* v. *Goodtitle*, *Leffee of Bailey*, Houfe of Lords, 15th of *May* 1787, which was upon a writ of error from *B. R.* in *Ireland*, and *Cumming* v. *Sibly*, 4 *Burr.* 2490.

(*b*) The rule as laid down in the report in *Salkeld* is this—If a judgment be below for the plaintiff, which is reverfed on error; yet if the record will warrant it, the Court ought to give a new judgment for the plaintiff: but if the judgment be erroneous and againft the plaintiff on the merits, that ought to be reverfed, and no new judgment given for the plaintiff. [Here the report in *Modern* fays, "and a new judgment given for the defendant."] If an erroneous judgment be given for the defendant, and it is reverfed, and the merits appear for the plaintiff, he fhall have judgment; if the merits be againft the plaintiff, the defendant fhall have a new judgment. So it is in the Exchequer-chamber: for they are to *reform*, as well as to *affirm* or *reverfe* it.

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arreſt of judgment in the court below; and therefore he is not entitled to coſts: but upon a ſpecial verdict the finding of the jury is in the alternative: and if the defendant be found to be in the right, the juſtice of the caſe is not anſwered merely by ſetting aſide the erroneous judgment for the plaintiff, but the defendant is entitled to an abſolute judgment upon the verdict found in his favor. And if the rule be general, as it now ſeems to be ſettled, that the court of error ought to pronounce the ſame judgment which the court below ought to have given; it will apply to this caſe, and the defendant will be entitled to his coſts within the ſtat. 23 *H.*8. *c.*15. which gives coſts to a defendant where the verdict is againſt the plaintiff in a caſe of this deſcription: and this has been holden (*a*) to extend to the caſe of a ſpecial as well as of a general verdict. So where judgment given by this Court for a defendant, upon a ſpecial verdict in ejectment, was reverſed in the Exchequer-chamber; that court, on motion, gave the plaintiff leave to enter up judgment of reverſal, and that he ſhould recover his term, damages, *and coſts* (*b*). They were then ſtopped by the Court.

Lord ELLENBOROUGH C. J. The court are bound ex officio to give a perfect judgment upon the record before them. In this caſe the judgment below was given for the plaintiffs upon a ſpecial verdict, where of courſe there was an alternate finding by the jury according as the Court ſhould be of opinion that the verdict and judgment ought to have been for the plaintiffs or for the defendant; if for the plaintiffs, the verdict was to be en-

(*a*) *Alſop* v. *Cleydon*, *Cro. Eliz.* 465.
(*b*) *Denn d. Mellor* v. *Moore*, in Error, 1 *Boſ.* & *Pull.* 30.

1810.

GILDART
against
GLADSTONE.

tered one way; if for the defendant, another way. This Court then having been of opinion that the judgment of the court of *C. P.* was erroneous, and ought to have been for the defendant below, which would have entitled him there to his costs on the verdict as found for him; we should not do him all the justice which he is entitled to receive upon the record now before us, if we did not, upon reversing the judgment below, give the same judgment which the court below ought to have given; which is a judgment for the costs of his defence in that court, as well as a judgment of acquittal.

The other judges concurred; and *Bayley* J. added that there were other cases where injustice would be done if the court of error were not to give the same judgment for a defendant, upon a reversal of the judgment of the court below against him, which the court below ought to have given; as in replevin and quare impedit; where the defendant, in the one case, would be entitled to a judgment de returno habendo, and, in the other, to a writ to the bishop (*a*).

(*a*) Vide per *Hobart* C. J. *Hob. Rep.* 163. in the great Commendam case of *Colt and Glover* v. *The Bishop of Lichfield and Coventry*.

1810.

The KING *against* BEARD.

Monday, July 9th.

THIS was an application for a mandamus to be issued to the defendant, a magistrate of *Lancashire*, commanding him to proceed to hear and determine an information exhibited before him by *J. S.* against *Robert Rawlinson* a pawnbroker, for certain trespasses and contempts against the late pawnbrokers' act of the 39 and 40 *Geo.* 3. *c.* 99. The information laid before the magistrate on the 4th of *June* 1810 charged that *Rawlinson* a pawnbroker at *Manchester* unlawfully demanded, received, and took from one *J. S.* in the name of *J. D.*, on redeeming the pledge after-mentioned, 6*d.* by way of profit for the loan of 3*s.*; the same being an intermediate sum, exceeding 2*s.* 6*d.* and not exceeding 40*s.*, which on the 15th of *December* 1809 was lent by *Rawlinson* to *J. S.* on a pledge of two spoons; the said pledge not having remained in pawn any time exceeding 6 calendar months: being more than at the rate of 4*d.* for the loan of 20*s.* by the calendar month; contrary to the statute: and then claimed a penalty of not less than 40*s.* nor more than 10*l.* The question was whether this were a case for a summary conviction in a penalty within the statute: the magistrate thought it was not, and refused to proceed upon the information.

The pawnbrokers' act, 39 & 40 *Geo.* 3. *c.* 99, having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges, *and no more*, the taking of more is an offence within the act, cognizable by a justice of peace on summary information within the 26th sect., which, after providing specific penalties for specific offences) says that "*for every other offence against this act*, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not less than 40*s.* nor more than 10*l* in the discretion of the justice.

The 2d section allows pawnbrokers to take a certain rate of interest on pledges, inter alia, "for every pledge "upon which there shall have been lent any sum not exceeding 2*s.* 6*d.* the sum of one halfpenny for any time "during which the said pledge shall remain in pawn, "not exceeding one calendar month; and the same for

 "every

1810.

The King *against* Beard.

"every calendar month afterwards, including the current "month in which such pledge shall be redeemed; "although such month shall not be expired. For every "pledge on which there shall have been lent the sum of "5*s.*, one penny." &c. "and so in proportion for any "fractional sum: which said several sums shall be taken "in lieu of and as a full satisfaction for all interest due, "and charges for warehouse room." By the 3d section, "In all cases where any intermediate sum lent upon pawn "shall exceed 2*s.* 6*d.*, and not exceed 40*s*, the lender "shall and may take by way of profit, as aforesaid, at the "rate of 4*d.*, *and no more*, for the loan of 20*s.* by the ca-"lendar month, including the current month as aforesaid." No penalty is given by these clauses, but penalties are given by several clauses of the act for specific offences; and the act also contains many regulating clauses. And by *f.* 26. "In case any pawnbroker shall in anywise "*offend against this act*, he shall for every such offence, in "neglecting to make, &c. any such entries in his books "as is required to be made by him by this act, forfeit "such sum, as to the justice before whom any information "thereon shall be heard and determined in his discretion "shall seem reasonable and fit, not exceeding 10*l.*: *and* "*for every other offence against this act, where no forfeiture* "*or penalty is provided or imposed on any particular or spe-*"*cific offence against any part of this act*, not less than "40*s.*, nor more than 10*l.*"

Topping and *Yates* now shewed cause against the rule, and stated the doubt entertained below to be, whether the taking by the pawnbroker of more than the stipulated rate of interest, &c. permitted by the act in the 2d and 3d clauses, for which no penalty is given, were *an offence* against

1810.

The King against Bland.

against the act, so as to bring the case within the summary jurisdiction of the magistrate under the general words of the 26th section: particularly as this, being a penal act, was to be construed strictly: and as provision was made by the 14th section, which seemed to point out the proper remedy in this case; that if any pledge not exceeding in value 10*l.* shall be refused to be delivered up by the pawnbroker, upon tender by the owner of the loan and profit thereon, according to the table of rates established by the act, without shewing reasonable cause to the satisfaction of the justice, he may direct the restoration of the pledge, and commit the pawnbroker till such restoration made or compensation given to the owner. But the Court having intimated their opinion against the validity of the objection to the magistrate's proceeding: *Topping* and *Yates* said they could not deny that the taking more than the stipulated rate of profit was an offence, where the act says that so much *and no more* may be taken. And by

Lord ELLENBOROUGH C. J. It is prohibited by the act to take more than the stipulated rate of profit; and therefore the taking more is an offence against the act: and as no particular penalty is provided for that transgression, it falls within the general words of the 26th clause.

Per curiam, Rule absolute.

Scarlet and *J. Clarke* were to have supported the rule.

END OF TRINITY TERM.

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INDEX

TO THE

PRINCIPAL MATTERS.

3. The plaintiff being desirous to dispose of his interest in certain buildings, trade, and stock, in which trade he was engaged with the defendant, pending a treaty between them for the purchase by the defendant, the latter falsely and deceitfully represented to the plaintiff, that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that *those persons would not consent to the giving the plaintiff more for his interest than a certain sum:* whereas in truth neither *A.* and *B.*, with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum, and in fact the defendant charged them with a larger price in account for the purchase of the plaintiff's interest. Held, that an action on the case did not lie for this false and deceitful representation by the bidder concerning the seller's probability of getting a better price for his property: for it was either a false representation of another's *intention*, or at most a mere gratis dictum of the bidder, upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely. But that at any rate the count was bad, in not shewing that the plaintiff had been damaged by such false representation; inasmuch as it was not alleged that the other intended partners of the defendant would have bid at all *without him*, or that *he* would have *joined* in giving the additional price. *Vernon* v. *Keys*, *T.* 50 *G.* 3. 632

ADMINISTRATOR AND EXECUTOR.

See COMPENSATION, 2. COSTS, 2. EVIDENCE, 3. or PLENE ADMINISTRAVIT, 1. WITNESS, 1.

1. On plea of plene administravit, proof of an admission by the executor, that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley* v. *Russell*, *E.* 50 *G.* 3. 232
2. The executor having pleaded non assumpsit as well as plene administravit and plene administravit praeter, &c., and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non assumpsit, and being entitled to judgment of assets quando acciderint, is entitled to the general costs of the trial, though the issue of plene administravit was found for the defendant. *ib.*
3. The wife of an acting executor taking no beneficial interest under the will is a competent attesting witness to prove the execution of it, within the description of a credible witness in the statute of frauds 29 *Car.* 2. *c.* 3. *f.* 5. *Bettison* v. *Bromley*, *Bart.* *E.* 50 *G.* 3. 250

ADMIRALTY.

See ASSUMPSIT, 4.

AFFIDAVITS.

The affidavits made in answer to a rule nisi for an attachment must be entitled on the *civil* side of the court in the cause out of which the motion arises: but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are entitled on the crown side. *Whitehead* v. *Firth*, *H.* 50 *G.* 3. 165

AFFIDAVIT TO HOLD TO BAIL.

A defendant cannot be held to special bail on an affidavit stating him to be indebted to the plaintiff in so much for goods *bargained and sold*, without also saying *delivered*. *Hopkins* v. *Vaughan*, *E.* 50 *G.* 3. 398

AGENT AND PRINCIPAL.

See Assumpsit, 4. Receiver. Witness, 1.

AGREEMENT.

See Assumpsit. Covenant. Insurance, 10. or Charter-party, 3. Interest. Landlord and Tenant, 1.

1. Printed conditions of sale of timber growing in a certain close, not stating any thing of the quantity; parol evidence, that the auctioneer at the time of sale warranted a certain quantity, is not admissible, as varying the written contract. *Powell* v. *Edmunds*, *H.* 50 *G.* 3. 6

2. An instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease or leases; as where the one *thereby agrees to let*, and *the other agrees to take* land for 61 years at a certain rent for building, and the tenant agreed to lay out 2000*l.* within 4 years in building 5 or more houses, and when 5 houses were covered in the landlord agreed to grant a lease or leases (which might be for the more convenient underletting or assignment of the leases,) *but this agreement was to be considered binding till one fully prepared could be produced.* *Poole* v. *Bentley*, *H.* 50 *G.* 3. 168

3. The rules which govern the construction of conditions to create real estates do not apply to personal contracts, which must be performed according to the words and apparent meaning of the parties, and are not satisfied by a performance cy-pres. *Want and Another*, *Executors*, &c. v. *Blunt*, *H.* 50 *G.* 3. 183 (*See further* Life Insurance.)

4. Upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a *joint sale* to him by both, of sheep, their *joint* property, the plaintiff cannot recover upon proof of a contract of sale and warranty by *one* only as of his separate property: the action, though laid in tort, being founded on the joint contract alleged. *Weal* v. *W. and H. King*, *T.* 50 *G.* 3. 452

5. Where by agreement between the plaintiffs, bankers at *Carlisle*, and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favor of the plaintiffs at a certain date: held, that the notes so sent by the plaintiffs to the defendants constituted a *debt* against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the

the defendants who had obtained their certificates. *Forster* v. *Surtees*, *T.* 50 *G.*3. 605

ALIEN ENEMY.

See ASSUMPSIT, 4. INSURANCE, 3, 4, 5, 6.

To trespass and false imprisonment, a plea of alien enemy is not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbrodt* v. *Payne*, *H.* 50 *G* 3. 206

ANNUITY.

An annuity granted by one who was mortgagor in fee in possession of lands, on which it was secured, of greater annual value than the interest of the mortgage and the annuity, is within the exception of the 6th section of the annuity act 17 *G.* 3. *c.* 26., as a grant of an annuity by one who was *seised in fee simple*; and therefore no memorial of it need be inrolled: the *seisin in fee* there excepted extending in parity of reason to *equitable* as well as *legal* estates. And though a replication, alleging that the grantor was, at the time of the annuity granted, *seised in fee simple* in possession of the premises on which the annuity was charged, would, abstracted from the subject-matter, by the mere force of the words *seised in fee simple*, be considered as alleging a *legal seisin*; yet, with reference to the subject-matter, and to the plea, to which it was an answer; which alleged that the grant was made after the annuity act, and that no memorial of it was inrolled according to that act; it shall be taken to mean such an estate as is deemed to be a *seisin in fee*, within the construction of those words in the annuity act. *Amhurst* v. *Skynner*, *E.* 50 *G.* 3. 263

APPEAL.

1. Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases. *The King* v. *Knill*, *Hil.* 50 *G.* 3. 50
2. Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament; a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by certiorari. *The King* v. *Shaw*, *T.* 50 *G.* 3. 479
3. No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under the stat. 6. *G.* 3. *c.* 25. for absenting himself from his master's service; the clause of appeal in that statute excepting *an order of commitment*; and the order of commitment in question containing a conviction of the collier for an offence within the act. *The King* v. *The Justices of Staffordshire*, *T.* 50 G. 3. 572

APPRENTICE.

1. The stat. 20. *G* 2. *c.* 19. *s.* 4. enabling two magistrates, "upon application or complaint made upon oath by any master against such apprentice" as is described in the act, touching

touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley* v. *Jowle*, *E.* 50 *G.* 3. 248

2. An indenture binding out a poor apprentice, executed by *W. S.* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negativing its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 *Car.* 2 *c.* 12. *s.* 21. and only *one* churchwarden, *by custom*, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King* v. *The Inhabitants of Hinckley*, *E.* 50 *G.* 3. 361

ASSETS.

See EVIDENCE, 3.

ASSUMPSIT.

1. Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expence of repairing the gates and fences of the farm; and that the value of the hay, &c., and of the repairs, should be settled by third persons; held that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him, in a count upon a general indebitatus assumpsit for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds* v. *Burrows*, *H* 50 *G.* 3. 1.

2. The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was *still liable* upon the bill in default of the acceptor, 3 months after it was due, said that *he knew that he was liable, and if the acceptor did not pay it, he would*: held that he was bound by such promise. *Stevens* v. *Lynch*. *H.* 50 *Geo.* 3. 38

3. Upon a guarantie by the defendant to the plaintiff "for any goods he hath or *may* supply *W. P.* with to the amount of 100*l.*," the plaintiff may declare as upon a continuing or standing guarantie to that extent, for goods which may at any time have been supplied to *W. P.*, until the credit was recalled; although goods to more than 100*l.* had been before supplied and paid for. *Mason* v. *Pritchard*, *E.* 50 *G.* 3. 227

4. The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon*, under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*; which cargo being captured by a *British* cruizer, and libelled for condemnation in the court of Admiralty as *French* and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the

defendant was their agent. *De Mattos and Another* v. *De Mello*, *E.* 50 *G.* 3. 234

4. The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter. *Shee* v. *Clarkson*, *T.* 50 *G.* 3. 507

5. A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement, is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. *Griffith* v. *Young*, *T.* 50 *G.* 3. 513

7. The plaintiffs having contracted, by charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, *to commence from the day of her sailing from* Gravesend on the voyage there stated, and having covenanted that she should sail from the *Thames* to any *British* port in the *English* Channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return-cargo to *London*; afterwards agreed *by parol* with the defendants, that the ship, instead of loading at some port in the Channel, should load *in the* Thames, and that the freight should *commence from her entry outwards at the custom-house*: held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time, and execution, and might, therefore, be enforced by action of assumpsit. *White* v. *Parkin*, *T.* 50 *G.* 3. 578

ATTORNEY.

See PLEADING, 5.

A party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the stat. 2 *G.* 2. *c.* 23. *s.* 23. which delivery was accordingly made to the second attorney in the cause: held that this was a sufficient delivery to *the party to be charged therewith*, within the words and meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. *Vincent* v. *Slaymaker*, *E.* 50 *G.* 3. 372

ATTORNEY, POWER OF.

See CONUSANCE, 1.

AUCTION.

See AGREEMENT, 1. STAMP, 2.

AWARD.

Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of *costs*, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead* v. *Firth*, *H.* 50 *G.* 3. 165

BASTARD.

The husband being found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home; the conclusion is irresistible, that such child is a bastard. *Rex* v. *The Inhabitants of Maidstone*, *T.* 50 *G.* 3. 550

BAIL.

1. Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money *or* render the principal, and not absolutely to pay the condemnation money, as in case of reversals of outlawry upon the stat. 31 *Eliz. c.* 3 for want of proclamations, or upon the stat. 4 & 5 *W.* & *M. c.* 18. *s.* 3. on appearance by attorney and by motion. *Havelock* v. *Geddes*, *T.* 50 *G.* 3. 622
2. On reversal of an outlawry on writ of error, because the party was beyond sea at the time of the exigent promulgated, in a case where special bail was required in the original action, the court will direct the recognizance of bail in answer to the new action to be taken in the alternative, to pay the condemnation money, *or* render the principal, and not absolutely to pay the condemnation money. *Serocold* v. *Hampsey*, *H.* 16 *G* 2. cited *ib.* 624

BANKRUPT.

1. Where by agreement between the plaintiffs, bankers at *Carlisle*, and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking-houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favor of the plaintiffs at a certain date; held that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants who had obtained their certificates. *Forster and Another* v. *Surtees and Others*, *T.* 50 *G.* 3. 605
2. *A.* having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price; and *B.* sold the same to *C.*, and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the said 10 tons, which continued mixed with the rest in *A.*'s cistern: yet held that this was a complete sale and delivery in law of the 10 tons by *B.* to *C.*; nothing remaining to be done on the part of the seller; though as between him and *A.* it remained to be measured off: and therefore that *B.*, the seller, could not, upon the bankruptcy of *C.*, the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the 10 tons to the buyer; nor were the goods in transitu, so as to enable the seller to stop them. *Whitehouse and* Others.

Others, Assignees of Townshend, a Bankrupt, v. *Frost and Others, T.* 50 *G.* 3. 614

3. A trader having securities in his bankers' hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount *on the score of his accommodation*, payable to his own order, which he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it *the amount of the sum* accepted *for the accommodation* of the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they were liable to account in another form of action (not on the bill) to the bankrupt's assignees. *Willis* v. *Freeman and Others, T.* 50 *G.* 3. 656

4. A bankrupt sued by his surety, or person who was liable for his debt, at the time of the commission issued against him, (though the surety, &c became such after the act of bankruptcy, and paid the debt after the issuing of the commission,) cannot, without specially pleading it, *in like manner* as after the stat. 5 *G.* 2. *c.* 30. *f.* 17. avail himself of his certificate under the stat. 49 *G* 3 *c.* 121. *f.* 8. which *discharges* the bankrupt having his certificate of all such *demands*, at the suit of every such person, *in like manner to all intents and purpose* as if such person had been a creditor before the bankruptcy. *Stedman* v *Martinnant, T.* 50 *G.* 3. 664

BASTARDY, ORDER OF,

See APPEAL, 1.

BILLS OF EXCHANGE.

1. The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said *that he knew he was liable, and, if the acceptor did not pay it, he would.* Held that he was bound by such promise. *Stevens* v. *Lynch, H.* 50 *G.* 3. 38

2. A protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects, in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of assets between them unascertained at the time, which might then have afforded probable ground of belief to the drawer that his bill would be honored. *Legge* v. *Thorpe, H.* 50 *G.* 3. 171

3. *A.* being partner with *B.* in one mercantile house, and with *C.* in another; the house of *A.* and *B.* indorse a bill of exchange to the house of *A.* and *C.*; after which *B.*, acting for the house of *A.* and *B.*, receives securities to a large amount from the drawer of the bill, upon an agreement by *B.*, that the bill should be taken up and liquidated by *B.*'s house, and if not paid by the acceptors when due, should be returned to the drawer: Held that the securities being paid and the money received by *B.* in satisfaction of the bill, *A.* was bound by this act of his partner *B.*, whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of *A.* and *B.*, but also individually in other respects; and therefore that he could not, in conjunction with *C.*, his partner in the other

other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with *B.* in discharge of the same. *Jacaud and Another* v. *French and Others. E* 50 G. 3. 317

4. Upon a motion to refer it to the Master to compute principal, interest, and costs, upon a bill of exchange, drawn in *Scotland* upon and accepted by the defendant in *England*, the Court will not direct the Master to allow re-exchange. *Napier* v. *Schneider, E.* 50 *G.* 3. 420

5. The want of due notice of the dishonor of a bill is answered by shewing the holder's ignorance of the place of residence of the prior indorser, whom he sues, and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury. *Bateman* v *Joseph, T.* 50 *G.* 3. 433

6. The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused; and then immediately returned it on the second indorser; who, not knowing of the laches, took up the bill: held that his ignorance, when he paid the bill, of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence. *Roscow* v. *Hardy, T.* 50 *G* 3 434

7. A trader having securities in his bankers' hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount *on the score of his accommodation*, payable to his own order, which he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it the amount of the sum accepted for the accommodation of the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they (the acceptors) were liable to account in another form of action (not on the bill) to the bankrupt's assignees. *Willis* v. *Freeman and Others, T.* 50 *G.* 3. 656

BILLS OF LADING.

1. A freighter of a ship to *Spain* and *Portugal*, or either, *as the master should be directed by the freighter or his agents*, having first ordered the master to proceed to *Lisbon*, in consequence of which the master had taken in goods and signed bills of lading to that port, cannot afterwards countermand that order, and order him to proceed to *Gibraltar*, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon. *Davidson* v. *Gwynne, E.* 50 *G.* 3. 381

And *vid.* CHARTER-PARTY, 2,

2. The master is entitled to recover freight upon a charter-party, as upon *a right and true delivery of the cargo agreeably to the bills of lading*, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently: the party injured having his counter remedy by action for such negligence. *ibid.*

BOND.

1. A bond given *to trustees* to secure the faithful services of a clerk to the *Globe* insurance company, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actually existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body; and the intervention of the *trustees* removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf, Bart. and Others* v. *Bruin*, *E.* 50 *G.* 3. 400
2. A bond conditioned to pay costs on 29th of *November* in *Cumberland*, when taxed by the master of K. B. is forfeited by non-payment; though in fact the costs were only taxed on the 25th *Nov.*, of which the defendant had no notice on or before the 29th; for the *defendant* might have had them taxed before, and thus have known their amount in time. *Bigland* v. *Skelton*, *T.* 50 *G.* 3. 436

BONDING WINES,

See MONOPOLY.

BRIDGES.

The inhabitants of a county are bound to repair every *public* bridge within it, unless, when indicted for the non-repair of it, they can shew by their plea that some other person, or body politic or corporate, is liable; and every bridge *in a highway* is, by the statute of bridges, 22 *H.* 8. *c.* 5. taken to be a public bridge for this purpose. Therefore, where Queen *Anne*, in 1708, for her greater convenience in passing to and from *Windsor* castle, built a bridge over the *Thames* at *Datchet*, *in the common highway* leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before; held that the inhabitants of the county of *Bucks*, who, in answer to an indictment for the non-repair of that part of the bridge 13 years afterwards pleaded these matters, and traversed that the bridge was a common public bridge, were bound to rebuild and repair it. *The King* v. *The Inhabitants of the County of Bucks*, *H.* 50 *G.* 3. 192

BRISTOL DOCKS,

See COMPENSATION, 1.

BROKER.

The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such returns, and only to pay over the difference to the underwriter. *Shee* v. *Clarkson*, *T.* 50 *G.* 3. 507

BY-LAW,

See CORPORATION, 1. OFFICE, 2.

CAMBRIDGE UNIVERSITY,

See CONUSANCE.

CANAL.

By the act for making and maintaining the *Glamorganshire* canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, maintaining, improving, and using the canal, and other works;" and the company were required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an *annual account* of the rates collected, *and of the charges and expences of supporting, maintaining, and using the navigation and its works:* and the sessions are authorized, in case it appears to them that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the company (i. e in making and completing the canal and its works,) to reduce the canal rates; held that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expences, stated in the annual account of disbursements, for *new* works, such as a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected *for the support and improvement of the original line of canal, and for the better supplying it with water in . . seasons.* Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the sessions. *The King v. The Glamorganshire Canal Company, H.* 50 G. 3. 157

CHARTER,

See Corporation. Office, 2.

CHARTER-PARTY.

1. Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed—"and it is hereby *covenanted and* "*agreed by and between* the said parties *that* 40 *days shall be allowed* "for unloading and loading again, "&c.," was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in assumpsit, as upon an implied new contract. *Randall* v. *Lynch, H.* 50 G. 3. 179

2. Where the master of a vessel covenanted with the freighter, (inter alia) that the vessel should proceed with the *first* convoy from *England* for *Spain* and *Portugal,* or either, *as he should be directed by the freighter or his agents;* and there make *a right and true delivery of the cargo,* agreeably to the bills of lading signed for the same; and so take in a home cargo, and return and make *a right and true delivery* thereof at *London,* &c. *In consideration whereof, and of every thing above mentioned,* the freighter covenanted (inter alia) to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder *on the right and true delivery* of the homeward cargo at *London* : held,

1st, That the freighter having first ordered the master to proceed to *Lisbon,* in consequence of which the master had taken in goods and *signed bills of lading* for that port, could not afterwards countermand that order, and order him to proceed to *Gibral-*

tar,

tar, without firſt recalling the bills of lading, or at leaſt tendering ſufficient indemnity to the maſter againſt the conſequence of his liability thereon.

2d, But ſuppoſing the freighter had ſuch a power, yet his ſupercargo and agent, who was on board the veſſel, had the like authority in the abſence of his principal, even before the veſſel failed from this country, to alter again the deſtination to *Liſbon*.

3d, That the maſter having proceeded with the outward cargo to *Liſbon* under the firſt order, and brought home a return cargo, and delivered the ſame to the freighter at *London*, was entitled to his freight for that voyage; though he had not ſailed with the *firſt* convoy, the ſailing with the *firſt* convoy not being a *condition precedent* to his recovering freight for the voyage actually performed under the firſt order, but a diſtinct covenant, for the breach of which he was liable in damages.

4th, And he was entitled to recover ſuch freight as upon *a right and true delivery of the cargo agreeably to the bills of lading*, upon proof of having delivered the entire number of cheſts, &c. for which bills of lading had been ſigned; though it appeared that the contents of the cheſts of fruit were damaged by the negligence of the maſter and crew on board, in not ventilating them ſufficiently: the party injured having his counter remedy by action for ſuch negligence. *Davidſon* v. *Gwynne*, *E.* 50 G. 3 . 381

3. Where a ſhip was chartered to take a cargo of lead from *London* to *St. Peterſburgh*, and there immediately receive a return cargo from the freighters' agent, and bring it to *London*; with a proviſo, that if political circumſtances ſhould prevent a return cargo from being loaded, the maſter, after waiting at *St. P.* 40 running days, without the outward cargo being unloaded, and conſequently without the return cargo being loaded, ſhould be at liberty to return to *London* or any port in *England*: and the ſhip not having been permitted to unload at *St. P.* by the *Ruſſian* government, the maſter, after waiting there the 40 running days, loaded a *return* cargo *for his own benefit* upon the outward cargo, both of which he brought home, and earned *new freight on the homeward cargo*; which freight was adjudged to him by the judgment of the court of C. B. in an action between him and the freighters, over and above the dead freight ſtipulated to be paid by the charter-party: held that the freighters were entitled to recover the whole of ſuch dead freight from the underwriters upon a policy of inſurance, whereby they agreed *to pay a loſs in caſe the maſter ſhould not be allowed by the* Ruſſian *government to unload the outward cargo at* St P.; *the veſſel having ſailed chartered by the freighters on a voyage from* London *to* St. P. *and back*: and that the underwriters were not entitled to deduct ſuch return freight earned by the maſter on his own account, and adjudged to him by C. B; they having agreed with the aſſured pending this action, and pending the action in C. B. that in caſe the plaintiffs (to whom they had paid a per centage loſs) ſhould not be able to obtain ſo large an allowance as the full return freight paid to the maſter, *by reaſon of any demurrages or expences being allowed againſt the ſaid freight*, the difference ſhould be paid by the underwriters by further per centage, whether the ſame were ſettled between the plaintiffs and the maſter of the ſhip by arbitration, *or by legal deciſion*. *Puller and Another* v. *Halliday*, *T.* 50 G. 3. 494

4. Where a ſhip was chartered to take a cargo of lead from *London* to *St. Peterſ-*

Petersburgh, and there immediately receive a return cargo from the freighters' agent and bring it to *London*, with a proviso that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. Petersburgh* 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London* or any port in *England*: held, that such political circumstances having occurred as hindered the unloading of the outward cargo at *St. P.*, and the ship having waited the 40 running days there, the master was entitled to receive the freight of a *homeward* cargo, which he loaded *on his own account* upon the outward cargo, and brought home; in addition to the dead freight payable by the freighters according to the stipulations of the charter-party. *Bell* v. *Puller and Another*, *H.* 50 *G.* 3. 496

CHESTER,

See PRACTICE, 3.

CHURCHWARDENS.

An indenture binding out a poor apprentice, executed by *W. S.* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negativing its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 21. and only *one* churchwarden, by *custom*, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King* v. *The Inhabitants of Hinckley*, *E.* 50 *G.* 3. 361

CINQUE PORTS,

See SMUGGLING.

COMMITMENT,

See CONVICTION.

COMPANY TRADING BUT NOT INCORPORATED,

See BOND.

COMPENSATION.

1. Under the *Bristol* dock act, 43 *G.* 3. *c.* 140. *s.* 107., which gives compensation where, "by means of the dock-works, or in the progress or execution thereof, damages may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied by means of pipes laid under low water mark; the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament. *The King* v. *The Directors of the Bristol Dock Company*, *T.* 50 *G.* 3. 429
2. The compensation clause in the *London* dock act, 39 & 40 *G.* 3. *c.* 47. reciting that divers tenements, &c. may become less valuable by the trade being diverted therefrom, provides that in case they do so, or the *owners* or *occupiers* suffer loss by the dock works, the commissioners shall make them compensation; and no claim is to be made for compensation till three years after the opening of the docks; and then it is to be made within a given time; held,

that where the owner of the inheritance of a tenement, which was in lease, died after three years from the opening of the docks, without having made any claim; her devisee, and not her executor, was entitled to claim, within the time allowed, compensation for an injury done by the dock works to the inheritance in the time of his testatrix. *The King* v. *The Commissioners of Compensation under the London Dock Acts*, T 50 G. 3. 4:7

CONDITION IMPLIED OR PRECEDENT,

See CHARTER-PARTY, 2. MONOPOLY.

The owner of a homeward-bound ship entering the *West India* docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be quayed and unloaded in rotation in the import dock in the manner required by the 39 *G.* 3. *c.* 69. is bound to bear the extra expences of labourers for pumping the ship after the crew were discharged, and for delivering the cargo into lighters in the outward dock or basin; also for coopering previous to such delivery into lighters, and for the hire of such lighters; the company having afterwards unladen the cargo out of such lighters upon the quays in the import dock, and performed the requisite cooperage, &c. upon such unlading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in proper time and place. For the labour and expence required to be performed and incurred by the company upon a ship entering the docks to discharge her cargo must be understood of the ordinary labour and expences of navigating, mooring, unmooring, removing, and managing a ship which is in a reasonably navigable, moorable, unmoorable, removeable, and manageable condition; and not of a ship incapable of performing with safety those ordinary functions. *Blackett and Another* v. *Smith*, *Treasurer of the West India Dock Company*, *T.* 50 G. 3. 518

CONTRACT,

See AGREEMENT.

CONUSANCE.

1. Conusance of a plea of trespass sued against a resident member of the university of *Cambridge* for a cause of action, verified by affidavit to have arisen within the town and suburbs of *Cambridge*, over which the university court has jurisdiction, was allowed upon the claim of the vice-chancellor, on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by acts of parliament, and averring the cause of action to have arisen within such jurisdiction. Though it was objected,

1st, That the claim of conusance was stated on the roll to be made by the attorney of the V. C., when the power which constituted the person attorney was executed by the V. C., as V. C. and deputy of the chancellor, masters, and scholars of the university; and therefore that the claim ought to have been made by the attorney in their names. But it sufficiently appeared that he was attorney for the V. C. claiming ex officio.

2dly, That the claim was preferred too early, upon the mere issuing of the writ of latitat against the privileged member to answer in a plea of trespass, before declaration; by which it could not appear where the cause of action arose, and consequently

quently that it arose within the town and suburbs of *Cambridge*, to which the jurisdiction of the university court in personal actions is confined and that it was not sufficient to supply that fact by affidavit. But held that it was the usual course to support claims of conusance by affidavits verifying the necessary facts, which it was competent to the plaintiff to deny in the same mode; and that the difficulty was not greater before than after declaration; and the sooner the claim, if well founded, was preferred, the better for the plaintiff.

3dly, That if the claim might be preferred upon the latitat, before declaration, then it ought to be preferred *in the first instance* after the return of the latitat; namely, upon the day of appearance given by the rule of court, *i. e.* in eight days. But held that *the first instance after the return-day of the writ*, which is the first step of the plaintiff entered on the record, continues till the declaration filed, which is the next step taken by the plaintiff on the record; within which time the claim was made.

4thly, That it appeared by the roll on which the power of attorney to claim the conusance, and the claim itself, were entered, that the claim was made on the return day of the writ, *i. e.* the 15th of *November*, before the power of attorney to claim it was executed, which bore date on the 27th. But the Court took notice that the claim was in fact made on the 28th, in the letter missive and significatory of the V. C. to them; although in making up the roll it was entered by their officer as on the return-day of the writ by relation; no subsequent day in Court being then given on the record.

5thly, That taking the letter missive and significatory of the V. C. to be the original and proper claim of conusance, it was defective in not alleging that the cause of action arose within the jurisdiction; and that this could not be supplied by the formal entry of the claim on the roll made by the officer of the court, in which that averment is made from the affidavit. But held that such averment made in the formal entry of the claim on the roll, verified by affidavit, of which the Court would take notice, was sufficient. *Browne* v. *Renouard*, *H.* 50 *G* 3. 12

CONVICTION.

See APPRENTICE.

1. The stat 43 *G* 3. *c.* 141. does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey* v. *Johnson*, *H.* 50 *G* 3. 67

2. But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, a justice of the peace, ex mero motu, without any information laid on oath before him, (though falsely alleged to be on the information on oath of *J. S.*,) on which the plaintiff was taken and imprisoned, were a conviction within the meaning of the act; so that the plaintiff was thereby confined to seek redress by an action on the case framed as the act directs; the Court would not inquire of on affidavit, but sent the case to a new trial to have the fact of such conviction ascertained. And it appearing on a second trial, that an information on the oath of *T. O.* on a charge of vagrancy against the plaintiff, was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon the charge, and that the magistrate then made out a warrant of commitment until the next

next sessions; in which warrant it was wrongly stated that the plaintiff had been charged on the oath of *T. S.*, (who negatived having made any such oath;) but which allegation it was held might be rejected as surplusage; and afterwards drew up a conviction dated on the same day, but not exhibited till a month afterwards at the sessions: held that this was sufficient evidence of a conviction connected with the imprisonment, however informally such conviction, or warrant of commitment operating as a conviction, were drawn up; and, therefore, that at all events the magistrate was protected against this action of trespass. *ib.* 67

3. The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. *ib.*

4. No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under the stat. 6 *G.* 3. *c.* 25. for absenting himself from his master's service, the clause of appeal in that statute excepting an order of commitment; and the order of commitment in question containing a conviction of the collier for an offence within the act. *The King* v. *The Justices of Staffordshire*, *T.* 50 *G.* 3. 572

5. The pawnbrokers' act, 39 & 40 *G.* 3. *c.* 99. having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges *and no more*, the taking of more is an offence within the act, cognizable by a justice of the peace on summary information within the 26th section; which (after providing specific penalties for specific offences,) says, that "for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not less than 40*s.*, nor more than 10*l.* in the discretion of the justice. *The King* v. *Beard*, *T.* 50 *G.* 3. 673

COPYHOLD.

Copyhold descending by custom to all the children equally of the tenant last seised, one of the parceners may maintain ejectment on his single demise for his own share. *Roe d. Raper* v. *Lonsdale*, *H.* 50 *G.* 3. 39

CORPORATION.

See OFFICE, 2.

A charter giving the right of electing an alderman to the mayor and burgesses of *Nottingham* at large from themselves, a by-law, stated to be made in 1577 by the then mayor and burgesses, but *not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, viz. the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town and called *the livery or clothing burgesses* for the time being, or *so many of them as should be duly assembled together* for that purpose, whereof the mayor to be one, or the major part of them," was held to be a reasonable and valid by-law. But every by-law may be repealed by the same body which made it. And the office of *chamberlain of the town*, as stated in such by-law, was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses. *The King* v. *Ashwell*, *H.* 50 *G.* 3. 22

COSTS.

1. Upon a submission by bond of all matters in difference between the parties in a cause, without making any

any mention of *costs*, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead* v. *Firth*, *H.* 50 *G.* 3. 165

2. An executor having pleaded non assumpsit, as well as plene administravit, and plene administravit præter, &c. and thereby forced the plaintiff to go to trial; the plaintiff, obtaining a verdict on the non assumpsit, and being entitled to judgment of assets quando acciderint, is entitled to the general costs of the trial, though the issue of plene administravit was found for the defendant. *Hindsley* v. *Russell, Executor*, *&c. E.* 50 *G.* 3. 232

3. A bond conditioned to pay costs on 29th of *November* in *Cumberland*, when taxed by the master of *K. B.* is forfeited by non-payment; though in fact the costs were only taxed on the 25th of *November*, of which the defendant had no notice on or before the 29th; for *the defendant* might have had them taxed before, and thus have known their amount in time. *Bigland* v. *Skelton*, *T.* 50 *G.* 3. 430

4. Judgment having been given in *C. B.* for the plaintiffs upon a special verdict in assumpsit, which was reversed upon writ of error in this court, the defendant is entitled here not only to judgment of acquittal, but also *for the costs of his defence in C. B.*, being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs by the stat. 23 *H.* 8. *c.* 15. *Gildart* v. *Gladstone, and Gladstone in Error*, *T.* 50 *G.* 3. 668

COUNTY RATE.

Where before the stat. 12. *G.* 2. *c.* 29. the county rates had been assessed upon the district or place of *Hartishead* with *Clifton*, but the two townships of *H.* and *C.* separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet as that statute only establishes the accustomed proportions of contribution to the county rates, as between the entire districts which were before assessed to such rates within the limits of the respective counties, &c., and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts; this case was held to fall within the 3d section; which provides that where there is no poor's-rate in the *parish, township, or place* assessed to the county rates, (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates) the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied; that is, by an *equal* rate on all the inhabitants, &c. *The King* v. *The Justices of the W. R. of Yorkshire*, *H.* 50 *Geo* 3. 117

COVENANT.

1. Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed, "and it is hereby *covenanted and* "*agreed by and between* the said par-"ties, *that* 40 *days shall be allowed* "for unloading and loading again, "&c.," was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in assumpsit, as upon an implied new contract. *Randall* v. *Lynch*, *H.* 50 *G.* 3. 179

2. The

2. The plaintiffs having contracted, by charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, *to commence from the day of her sailing from Gravesend* on the voyage then stated; and having covenanted that she should sail from the *Thames* to any *British* port in the *English* channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London*; afterwards agreed *by parol* with the defendants, that the ship, instead of loading at some port in the Channel, should load *in the Thames*, and that the freight should *commence from her entry outwards at the custom-house:* held that this subsequent parol contract was distinct from, and not inconsistent with, the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit. *White* v. *Parkin*. *T.* 50 *G.* 3. 578

3. Aliter where the charter-party allowed waiting for convoy at *Portsmouth* and *Ferrol*, and a parol agreement was attempted to be substituted for that, to wait for convoy at *Corunna*. *Leslie* v. *De la Torre*, *sittings after Trinity* 1795, *cor. Ld. Kenyon* C. J. *cited*, *ib.* 583

CUSTOM.

1. Evidence of reputation of the custom of a manor, that in default of sons, the *eldest daughter*, and in default also of daughters, the *eldest sister*, and in case of the death of all, *the descendants* of the eldest daughter or sister respectively, of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the *grandson* of an *elder sister*,) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and the *son* of an *eldest sister*. *Doe d. Foster and Another* v. *Sisson*, *H.* 50 *G.* 3. 62

2. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *ib.*

CUSTOM HOUSE OFFICERS.

See OFFICE, 1. SMUGGLING.

DEBT.

See BANKRUPT, 1. SMUGGLING, 1.

DEED.

See LANDLORD AND TENANT, 1. STAMP, 4.

DEPUTY.

See OFFICE, 2.

DEVISE.

1. After a devise to one and *her heirs* of certain lands in *A.*, and other devises to the same person and her *executors*, administrators, and assigns, of leasehold interests in *B.*, *C.*, and *D.*, a devise of *all the residue* of the *testator's estate and effects*, *real and personal*, whatsoever and wheresoever, not before disposed of, after payment of debts, legacies, and funeral expences, to the same devisee, *her executors*, *administrators*, *and assigns*, *for her own use absolutely*, will carry a distant reversion in fee in the lands in *B.*; the words of the residuary clause being large enough to carry the fee, as comprehending all the residue of the devisor's *real estate*, and giving it to the devisee *absolutely*; and the intent to devise the whole interest in all his remaining property not being rebutted by limiting the estate to her and *her executors*, *&c.*, omitting *heirs*; or by the limitation of *other* lands to her and *her heirs*; or by the prior

prior devise of a leasehold interest to the same person in the same lands of which the devisor had such distant reversion. *William d. Hughes and Wife* v. *Thomas, H.* 50 G 3. 141

2. Under a devise of lands to the testator's son and his heirs for ever; as to part of the lands, upon condition that he should pay to the testator's daughter 12*l.* a year till she came of age, and then pay her 300*l*; and in default of payment, that she should enter upon and and enjoy the said part to her and her heirs for ever: and in case his *son and daughter* both died without *leaving* a child or *issue*, he devised the reversion and inheritance of *all* the lands to another: held that the devise over was not an *executory devise*, but a *remainder* limited after successive estates tail in the son, and also in the daughter by implication: the intent being apparent, that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect: and this being the only construction which would give effect to such intent, consistently with the whole of the will taken together. *Tenny d. Agar* v. *Agar, E.* 50 G. 3. 253

3. Under a devise to *A.* (a natural son) then under age, and the heirs of his body; and "if he die before 21, *and* without issue," then over to other relations, and ultimately to the testator's own right heirs: held that *A.*, having attained 21, the limitations over did not take effect; as by the natural sense of the word "*and*," they were made to depend upon the happening of both events, *i. e.* the son's dying before 21, *and* without issue. And this construction was not varied by a codicil made *after* the son attained 21; by which the testator *confirmed* every part of his will *so far as his affairs were consistent*. *Doe Lessee of Usher* v. *Jessop. E.* 50 G. 3. 288

4. Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain* 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last mentioned premises, to raise the 3000*l.*, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21. And a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust by sale, lease, or mortgage of the same, to raise 3000*l.* and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expences, and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21. With a

Proviso, "that it should be lawful for the trustees, and the survivor, at any time or times *till all* the said lands, &c. devised to them *should actually become vested in any other person or persons by virtue of the will*, or *until the same or any part thereof should be absolutely sold as aforesaid*, to lease the same or any part thereof, for any "term

"term of years not exceeding 14, "at the best rent:"—

Held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described, until his son *attained 21*, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees; which was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right d. Harriet Phillips and Others* v. *Smith*, *T.* 50 *G.* 3. 455

5. Under a devise to one and *her heirs* (she having two children before, and a third born after making the will,) *during their lives*: held that these latter words were repugnant to the others, and that she took an estate of inheritance. *Doe d. Cotton* v. *Stenlake*, *T.* 50 *G.* 3. 515

6. Where a testator devised all his real estate (except at *S.*) to the head of his family for life; and then to several of the junior branches in succession, to each for life; with remainder to his first and other sons in tail male; with the ultimate remainder to *his own right heirs*: and then devised his estate at *S.* to some by name of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male, and then devised that "for default of such issue," the estate at *S.* should go "to such person and persons, and for such estate "and estates, as should *at that time*," (*i. e.* on the death of the last tenant for life named, without issue male,) "and from time to time afterwards, "be entitled to the rest of his real "estate *by virtue of and under his will*:" held that the ultimate remainder in fee of the estate at *S.* vested *by descent* in the person who was *the testator's heir at the time of his death*, and did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate. *Doe d. the Earl and Countess of Cholmondeley* v. *Maxey*, *T.* 50 *G.* 3. 589

DEVISEE,

See Compensation, 2. Disseisin. Notice to quit.

DISSEISIN.

Tenant for life having levied a fine, and afterwards devised the premises, and died seised, the entry and continuing possession of the devisee (the defendant in ejectment,) is no disseisin of the reversioner; *disseisin* importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And, therefore, no question could arise whether, considering the devisee of the reversion as a disseisee, a fine sur cognizance de droit come ceo, levied by her before entry to a stranger, without any declaration of uses, would bar her right of entry by estoppel and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be altogether inoperative. *William d. Hughes and Wife* v. *Thomas*, *H.* 50 *G.* 3. 141

DISTRESS.

See Landlord and tenant, 1.

EASEMENT.

Under the *Bristol* dock act, 43 *G.* 3. *c.* 140. *s.* 107. which gives compensation where, "by means of the dock-works, or in the progress of execution thereof, damage may be done to any hereditaments, houses, lands,

lands, and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied by means of pipes laid under low-water-mark, the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament. *The King* v. *The Directors of the Bristol Dock Company*, *T.* 50 *G.* 3. 429

EJECTMENT.

See NOTICE TO QUIT.

1. Copyhold descending by custom to all the children equally of the tenant last seised, one of the parceners may maintain ejectment on his single demise for his own share. *Roe d. Raper* v. *Lonsdale*, *H.* 50 *G.* 3. 3?
2. The plaintiff in ejectment, under the several demises of two, may, after notice to quit, recover the possession of premises held by the defendant as tenant from year to year upon evidence that the common agent of the two had received rent from the tenant, which was stated in the receipts to be due to the two lessors; even assuming such receipts to be evidence of a joint tenancy; for a several demise severs a joint tenancy: and supposing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this case, as he had the whole title in him. *Doe d. Marsack and Others* v. *Read*, *H.* 50 *G.* 3. 57
3. It seems that a receiver appointed by the court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *ib.* 57
4. In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times, as evidence that they were tenants in common; for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clarke and Others* v. *Grant*, *T.* 50 *G.* 3. 221
5. In ejectment the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving, on cross examination, that an agreement *relative to the land in question* was produced at a former trial between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney; *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper: for though it might be an *agreement relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties. *Doe d. Sir Mark Wood* v. *Morris*, *E.* 50 *G.* 3. 237
6. *See* FORFEITURE *or* FINE.

ENEMY.

See ALIEN ENEMY. ASSUMPSIT, II. INSURANCE, 6. TRADING WITH ENEMIES.

ESCHEAT, INQUEST OF.

1. The statutes 8 *H.* 6. *c.* 16. and 18 *H.* 6. *c.* 6, prohibiting the granting to farm of lands seised into the king's hands,

hands, upon inquest before escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case without office, neither can the plaintiff in ejectment recover upon the demise of the crown. *Doe d. Hayne and His Majesty* v. *Redfern*, *H.* 50 *G.* 3. 96

2. And the 8th section of stat. 2 & 3 *Ed.* 6. *c.* 8., (which is in general terms, and not confined to the particular inquisitions mentioned in the other clauses of the act,) extends to avoid any such inquisition or office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expressly found their ignorance of the tenure: and a melius inquirendum shall be awarded. *ib.*

3. Quære, Whether at common law, upon the death of the tenant last seised of the land without heirs, the right and possession must be presumed to be immediately in the crown, without office, although the person last seised were the king's immediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised. *ib.*

ESTOPPEL.

See EVIDENCE, 4.

EVIDENCE,

See CONVICTION, 2.

1. Printed conditions of sale of timber growing in a certain close, not stating any thing of the quantity; parol evidence, that the auctioneer at the time of sale warranted a certain quantity, is not admissible, as varying the written contract. *Powell* v. *Edmunds*, *H.* 50 *G.* 3. 6

2. Evidence of reputation of the custom of a manor, that, in default of sons, the *eldest daughter*, and, in default also of daughters, the *eldest sister*, and in case of the death of all, *the descendants* of the eldest daughter or sister respectively of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the *grandson* of an *eldest sister*) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and *the son* of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *Doe d. Foster and Jamieson* v. *Sisson*, *H.* 50 *G.* 3. 62

3. On plea of plene administravit, proof of an admission by the executor, that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley* v. *Russell*, *E.* 50 *G.* 3. 232

4. The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*, which cargo being captured by a *British* cruiser, and libelled for condemnation in the court of admiralty as *French* and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: held, that the plaintiffs were, by thus colluding with the defendant to withdraw from the admiralty the decision of the true question, by establishing a false fact, estopped

from

from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *De Metton and Another* v. *De Mello*, E 50 G. 3. 234

5. In ejectment, the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross examination, that an agreement *relative to the land in question* was produced at a former trial between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney, *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper: for though it might be *an agreement relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties. *Doe d. Sir Mark Wood* v. *Morris*, E 50 G. 3 237

6. Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, seeks to protect the adventure under the King's licence to trade with the enemy, it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of a *general* licence dated three months before, licensing five neutral vessels to pass unmolested *to or from any port of* Holland *from or to any port of this kingdom*, with certain goods, (including the goods insured) which licence was directed to *R S and other* British *merchants*; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his user of it was lawful; as by shewing from whom and when he received it; and thereby connecting his own particular adventure with such general licence. *Barlow* v. *M'Intosh*, E. 50 G 3. 311

7. Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the Sessions, that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common form, was produced in court by the appellants; and the Sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent, that the appellants had not given legal evidence of the jurisdiction of the Sessions, to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash that order, which was removed by certiorari. *The King* v. *Shaw*, T. 50 G. 3. 479

EXECUTOR,

See Administrator and Executor.

FALSE IMPRISONMENT,

See Justices of Peace.

FALSE REPRESENTATION,

See Action on the Case, 3.

FELONY.

After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal. *Crosby* v. *Leng*, E 50 G 3. 409

FERRY.

FERRY,

See BRIDGE.

1. The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resiant within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the stat. 43 *Eliz. c.* 2. the occupancy of which subjects the party to the relief of the poor of the place. *The King* v. *Nicholson, E.* 50 *G.* 3. 330
2. The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground; the soil itself at the landing-places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it. *Williams, Executrix, &c.* v. *Jones, E.* 50 *G.* 3. 340

FILIATION, ORDER OF,

See APPEAL, 1.

FINE.

1. Tenant for life having levied a fine, and afterwards devised the premises, and died seised; the entry and continuing possession of the devisee (the defendant in ejectment) is no disseisin of the reversioner; *disseisin* importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And therefore, no question could arise whether, considering the devisee of the reversion as a disseisee, a fine sur cognizance de droit come ceo, levied by her before entry to a stranger, without any declaration of uses, would bar her right of entry by estoppel and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be altogether inoperative. *William d. Hughes and Wife* v. *Thomas, H.* 50 *G.* 3. 141
2. A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion. *Fenn, on the several demises of Matthews and Others,* v. *Smart, T.* 50 *G.* 3. 444

FORFEITURE.

A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion. *Fenn, on the several demises of Matthews and Others,* v. *Smart, T.* 50 *G.* 3. 444

FRAUDS, STATUTE OF,

See GOODWILL.

FREIGHT,

See CHARTER-PARTY.

FRIENDLY SOCIETIES.

It seems that no society is within the intent and meaning of the friendly society act, 33 *G.* 3. *c.* 54. so as to require the justices in sessions to allow and confirm their rules, &c. in the manner

manner therein provided for, if it appear that the general objects of such society are not confined to the charitable relief and maintenance of its old, sick, and infirm members, their widows, and children. *The King* v. *The Justices of Staffordshire*, *E.* 50 G. 3. 230

GLAMORGAN CANAL COMPANY,

See CANAL, 1.

GOODWILL.

A tenant having agreed with his landlady that if she would accept another for her tenant in his place (he being restrained from either giving the lease without her consent) he would pay her 20*l.* out of 100*l.* which he was [illegible] for goodwill, [illegible] in [illegible] from [illegible] [illegible] of [illegible] is liable to the landlady [illegible] the contract [illegible] executed, and [illegible] the [illegible] of [illegible] fraud [illegible] [illegible] 9 [illegible] G. 3. [illegible]

GUARANTEE.

A guarantee by the defendant to the plaintiff "for [illegible] *l.* may supply [illegible] with to [illegible] amount [illegible] 100*l.*" is a continuing standing guarantee to the extent [illegible] which [illegible] have been [illegible] good [illegible] more [illegible] had [illegible] for. *Mason* v. *Pritchard*, *E.* 50 G. 3. 2[illegible]

HIGHWAY-RATE.

An application under the highway act, 13 G. 3. c. 78. *s.* 47. for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non repair, ought to be made within a reasonable time after such levy, before any material change of inhabitants: and this Court refused a mandamus to the justices to make such rate after an interval of eight years, though applications had been from time to time made to the magistrates below in the interval who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted, the onus of repair being thrown by immemorial custom on an interior district; and though so lately as the year before this application the magistrates had ordered an account to be taken of the [illegible] expended upon the repairs [illegible] money levied. *The King* v. *The Justices of Lancashire*, *H.* 50 G. 3. 365

INDICTMENT.

See CONVICTION, 5. FELONY, OR [illegible], 3. [illegible] WORKS.

[illegible] the water of the public river *Avon* [illegible] by means of [illegible] works erected thereon, by [illegible] the inhabitants of *Bristol* [illegible] their water from the river [illegible] aggrieved, the only remedy [illegible] have been by indictment, ([illegible] by the *Bristol Dock* act 43 G. 3. c. 140.) and the owner of [illegible] whose brewhouse [illegible] before supplied with water by [illegible] low water mark, not [illegible] the water by way [illegible] tenement, were not entitled to compensation of the special jury under the general words of the act. [illegible] *Rex* v. *The* [illegible] *of the Bristol Dock Company*, *T.* 50 G. 3. 429

INQUISITION,

See ESCHEAT, INQUEST OF.

INSURANCE,

See ACTION ON THE CASE, 1. LIFE INSURANCE VOYAGE.

1. The plaintiff having shipped wood on an adventure to *St. Petersburgh* on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form in blank; and by a written memorandum in the policy "the under-"writers agreed to pay a total loss "in case the ship *Ann* should not be "allowed by the *Russian* government to discharge her cargo at *St.* "*P*., on which voyage the vessel "had then sailed chartered by the "plaintiffs." Held, that the insured were entitled to recover upon the policy, upon an allegation that the vessel on her arrival at *St P.* was not allowed by the *Russian* government to discharge her cargo, but was obliged to return back with it, *by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of insurance* &c. *Puller* v. *Glover*, *H* 50 *G* 3. 12

2. An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadstead at anchor under orders of the convoy, and after a signal to prepare for sailing, and about the time when the signal for weighing was made, taking in other goods on board; by which it was found that no delay was occasioned, and that the ship got under weigh as soon as she could otherwise have done. *Laroche* v *Oswin*, *H* 50 *G*. 3. 131

3. A licence to export goods to certain places within the influence of the enemy interdicted to *British* commerce, granted to *H. N* on behalf of himself *and other* British merchants, &c. is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson and Others* v. *Janson*, *E* 50 *G* 3. 223

4. An insurance having been made on goods, at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad; which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated; held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom and Others* v. *Bruce*, *E.* 50 *G* 3. 225

5. A ship was insured from *London* to any port or ports in the river *Plate*, until her arrival at her *last* port of discharge in that river, and the master, intending to discharge her cargo at *Buenos Ayres*, passed *Maldonado*, but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video*, with intent to make a complete discharge there, if the market were favorable; but after discharging a part, and not finding the market there so favorable as he expected, he had not abandoned his original intention of going to *Buenos Ayres*, if it should afterwards become practicable: but while he was still discharging part of his cargo at *Monte Video* a loss happened by a peril of the sea: held, that as *Buenos Ayres*, to which other port only in the *Plate* he had contemplated to go, was at the time of his arrival in the *Plate* (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video*

Video must be taken to be the ship's *last* port of discharge, and that on her arrival there the policy was discharged. *Brown* v. *Vigne, E.* 50 G. 3. 283

6 As the king cannot licence the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British*, as well as *enemy*'s, property in that manner (the former of which is legalized by the stat. 43 G. 3. c. 153. s. 15, 16. and 45 G. 3. c. 34.) the underwriters [illegible] to recover the premium for more than the amount of the *British* interest insured, the assured not [illegible] their claim to that extent. *Shiffner* v. *Gordon and Another, L.* 50 G. 3. [illegible]

7 In another case, where a licence was granted to cover a *Pr*[illegible] adventure out and home to and from the *Spanish South American* [illegible], upon condition that the [illegible] should [illegible] a certain proportion of *British* manufactures for the voyage out, and it afterwards appeared that the greatest part of the [illegible] was made up of *Spanish* goods, and only a very small quantity, merely nominal, of *British* manufactures, this was deemed to be colorable and in fraud of the licence, and therefore did not protect an insurance thereon. *Gordon* v. *Vaughan, L.* 49 G. 3. *B. R.* cited *ib.* 30

8. Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, sought to protect the adventure under the king's licence to trade with the enemy, it was not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of, a *general* licence, dated three months before, licensing *six neutral vessels* under certain neutral flags to pass unmolested *to or from any port of* Holland, *from or to any port of this kingdom*, with certain goods (including the goods insured); which licence was directed to *R. S.* and *other* British *merchants*; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his user of it was lawful, as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence. *Barlow* v. *M'Intosh, E.* 50 G. 3. 311

9 Goods insured upon a valued policy having been seized, confiscated and sold, by order of the enemy's government, on their own account, but the necessary documents to verify the loss not having arrived here, the underwriters on application to pay their subscriptions agreed to adjust and pay immediately 50*l.* per cent *on account*, but *no abandonment* was made by the assured, and in the mean time, the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of *half* the proceeds of the goods which had been so seized and sold; which half amounted to more than the whole sum at which they were valued in the policy: yet held, that the underwriters were not entitled to recover back the 50*l* per cent. they had paid on account, the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50*l* per cent. he had received, and there having been no abandon-

abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern. *Tunno* v. *Edwards*, *T.* 50 *G.* 3. 488

10. Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburgh*, and there immediately receive a return cargo from the freighters' agent, and bring it to *London*; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master after waiting at *St. P.* forty running days without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London* or any port in *England*: and the ship not having been permitted to unload at *St. P.* by the *Russian* government, the master, after waiting there forty running days, loaded a *return* cargo *for his own benefit* upon the outward cargo, both of which he brought home, and earned *new freight on the homeward cargo*; which freight was adjudged to him by the judgment of the court of *C. B.* in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party: held, that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed *to pay a loss in case the master should not be allowed by the Russian government to unload the outward cargo at* St. P.; *the vessel having sailed chartered by the freighters on a voyage from* London *to* St. P. *and back*: and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, and adjudged to him by *C. B.*; they having agreed with the assured pending this action and pending the action in *C. B.*, that in case the plaintiffs (to whom they had paid a per centage loss) should not be liable to obtain so large an allowance as the full return freight paid to the master *by reason of any demurrages or expences being allowed against the said freight*, the difference should be paid by the underwriters by further per centage, whether the same were settled between the plaintiffs and the ship by arbitration, *or by legal decision*. *Puller and Another* v. *Halliday*, *T.* 50 *G.* 3. 494

11. The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter. *Shee* v. *Clarkson*, *T.* 50 *G.* 3. 507

12. The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy,) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods, at the port of delivery, and applying that proportion, (be it a half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the damaged portion of the goods. *Usher* v. *Noble*, *T.* 50 *G.* 3. 630

13. An *American* ship insured from *New York* to *London*, warranted free from *American* condemnation, having, for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind and tide, driven on shore, where

she

she sustained partial damage, but was seized the next day, and afterwards with great difficulty and expence got off and finally condemned by the *American* government for breach of the embargo: held, that as there was ultimately a total loss by a peril excepted out of the policy the insured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the insured; neither, in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss, which appear to be covered by the general authority given to the assured to "labour and travail, &c. for the "defence, safeguard, and recovery "of the property insured." *Le* [illegible] v. *Jung[illegible]*, *T.* 50 G. 3. 64

INTEREST.

Though an agreement for the sale of goods, which were afterwards delivered, gave a certain day of payment for the price, interest does not run upon the sum due from that day. *Gordon* v. *Swan*, *E.* 50 G. 3. 4[illegible]

JOINDER IN ACTION,

See ACTION ON THE CASE, 1.

JOINT TENANTS AND TENANTS IN COMMON,

See EJECTMENT, 2.

In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times, as evidence that they were tenants in common; for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clarke and Others* v. *Grant*, *T.* 50 G. 3. 221

JUDGMENT, &c.

The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*; which cargo being captured by a *British* cruizer, and libelled for condemnation in the court of Admiralty as *French* and enemy's property, was ordered to be restored to the defendant, on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision on the true question by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *[illegible] and Another* v. *De Mello*, *T.* 50 G. 3. 234

JURISDICTION,

See CONVEYANCE. JUDGMENT.

By the act for making and maintaining the *Glamorganshire* canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, "completing, maintaining, improv-"ing, and using the canal and other "works;" and the company were required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an *annual account* of the rates collected, *and of the charges and*

and expences of supporting, maintaining, and using the navigation and its works: and the sessions are authorized, in case it appears to them that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the company, (*i. e.* in making and completing the canal and its works,) to reduce the canal rates: held that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expences, stated in the annual account of disbursements, for *new* works, such as a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected *for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons*. Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the sessions. *The King* v. *The Glamorganshire Canal Company*, *H.* 50 *G.* 3. 157

JURY.

1. The son of a juryman summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict, as for a mis-trial. *Hill* v. *Yates*, *E.* 50 *G.* 3. 229
2. So even upon the trial of a capital felony, it is a mere matter of challenge, and after verdict cannot be taken advantage of by the convict as a mis-trial. *Curry's case, at Newcastle, in* 1783, cited *ib.* 231

JUSTICES OF PEACE.

1. The stat. 43 *G.* 3 *c.* 141. does in no instance extend to protect justices of peace in the execution of their office, against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey* v. *Johnson*, *H.* 50 *G.* 3. 67
2. But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, a justice of the peace, ex mero motu, without any information laid on oath before him, (though falsely alleged to be on the information on oath of *J. S.*,) on which the plaintiff was taken and imprisoned, were a conviction within the meaning of the act, so that the plaintiff was thereby confined to seek redress by an action on the case framed as the act directs; the court would not inquire of on affidavit, but sent the case to a new trial to have the fact of such conviction ascertained. And it appearing on a second trial, that an information on the oath of *T. O.* on a charge of vagrancy against the plaintiff, was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magistrate then made out a warrant of commitment until the next sessions; in which warrant it was wrongly stated that the plaintiff had been charged on the oath of *T. S.* (who negatived having made any such oath;) but which allegation it was held might be rejected as surplusage; and afterwards drew up a conviction, dated on the same day, but not exhibited till a month afterwards at the sessions: held that this was sufficient evidence of a conviction

tion connected with the imprison ment, however informally such conviction, or warrant of commitment operating as a conviction, were drawn up; and, therefore, that at all events the magistrate was protected against this action of trespass. *Massy v. Johnson*, H. 50 G. 3. 67

3. The magistrate is liable to answer in an action for such part of an imprisonment suffered under his war rant as was within six calendar months before the action commenced against him. *ib.*

KING'S WAITERS IN THE PORT OF LONDON,

See Office, 1.

LANDLORD AND TENANT,

See Ejectment, 2, 3. Fine, 2. or Forfeiture, 1. Lease. Power

1. One being in possession of premises as tenant from year to year under an agreement for a lease of 14 years, and the rent being in arrear, enter into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that he had *agreed to quit and to deliver up the premises to them*, and that a valuation should be made of his effects on the premises by two indifferent persons, to be chosen, &c. and that the same should in the mean time be assigned and delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, in trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant: held that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects; such agree ment to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year, and, consequently, that the right of the landlords to distrain for the arrears of rent continued after six months from the making of the indenture. *Coupland and Another, Assignee of Leedham, a Bankrupt, v. Maynard*, H. 50 G. 3. 134

2. A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good will if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement; is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. *Griffith v. Young*, T. 50 G. 3. 513

LATH, INHABITANTS OF,

See Smuggling.

LEASE,

See Power, 1, 2. Devise, 4.

1. An instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease or leases; as where the one *thereby agrees to let*, and *the other agrees to take* land for 61 years at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years in building five or more houses; and when five houses were covered in, the landlord agreed to grant a lease or leases; (which might be for the more convenient underletting or assignment of the leases;) *but this agreement was to be considered binding till one fully prepared* could

could be produced. *Poole* v. *Bentley*, *H* 50 G. 3. 108

2. A proviso in a lease for 21 years, that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, *his executors or administrators*, so to do, upon 12 months' notice to the other of them, *his heirs, executors, or administrators*, extends, by reasonable intendment, to the devisee of the lessor, who was entitled to the rent and reversion *Roe d. Bamford* v. *Hayley*, *T.* 50 G. 3. 464

LICENCE TO TRADE WITH ENEMY,

See Insurance, 3. 6, 7, 8.

LIFE INSURANCE.

Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society *during his life*, and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premiums, on the quarter-days, *during his life*, and if he should also pay his proportion of contributions which *the members* of the society should, *during his life*, be called to make, in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any *member* neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless *the member* (*continuing in as good health as when the policy expired*,) paid up the arrears within six months, and 5*s.* per month extra: held that a member insuring, having died, leaving a quarterly payment over due at the time of his death, the policy expired; and that a tender of the sum by the member's *executor*, though made *within 15 days after it became due*, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member *in his lifetime, continuing in as good health as when the policy expired.* *Want and Another, Executors, &c.* v. *Blunt*, *H.* 50 G. 3. 183

LIGHTHOUSE,

See Poors-Rate, 2, 3.

LIVERPOOL.

Under the *Liverpool* dock acts of 8 *Ann.* and 2 Geo 3., tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*; which rate varies according to the several descriptions of voyages in the acts, one of which is to and from *America*, generally; so as no ship shall be liable to pay more than once *for the same voyage out and home*: held that a voyage out from *Liverpool* with a cargo to *Halifax* in *North America*, where the ship delivered it, and took in another cargo there for *Demarara* in *South America*, and after delivering that, returned to *Liverpool* with a cargo from *Demarara*, was all *the same voyage out and home*, within the meaning of the act, and chargeable only with one tonnage rate for the use of the docks. *Gildart* v. *Gladstone*, *in Error*, *T.* 50 G. 3. 439

LONDON DOCK COMPANY,

See Compensation, 2. Monopoly.

MANDAMUS,

See Compensation.

1. A mandamus for a highway rate to reimburse inhabitants on whom a fine

fine for non-repair had been levied after indictment, must be made in reasonable time. *Vide* HIGHWAY-RATE.

2 A rate to *reimburse* churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part *retrospective*, and therefore the Court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole; and their refusal to make such a rate, when demanded, apply[illegible] as well to the form as to the substance of the demand, the court would not grant the mandamus to raise the money in the common form of such a rate [illegible], out of which the churchwardens might repay themselves. *The King v. The Chapelwardens of [illegible] in [illegible]*, T. 50 G. 3. [illegible]56

3 For other instances, see particular heads.

MANOR.

See CUSTOM.

MASTER AND APPRENTICE,

See APPRENTICE.

MIS-TRIAL.

See NEW TRIAL.

MITTIMUS.

See PRACTICE, 3.

MODUS.

Prohibition denied to the spiritual court upon its rejection of a modus set up there of 1*d.* for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkies, at the option of the vicar; such modus not ascertaining any certain time when the money payment in lieu of the eggs was to be made, in case the option were made to take it in money. *Roberts v. Williams, H.* 50 G. 3. 33

MONOPOLY

See CONDITION IMPLIED.

Where private property, by the consent of the owner, is invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. Therefore where the *London* Dock Company, having built warehouses in which wines were deposited upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the general warehousing act of the 43 *G.* 3. *c.* 132., whereby it became lawful for the importer to lodge and secure the wines there, without paying the duties for them in the first instance; and it did not appear that there was any other place in the port of *London* where the importers had a right to bond their wines (though if the exclusive privilege had been extended to a few others, it does not appear that it would have [illegible];) held that such a monopoly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a *reasonable* hire and reward. But whether, having accepted such certificate, they could afterwards repudiate it at pleasure qu. *Allnutt and Another v. Inglis, Treasurer of the London Dock Company, T.* 50 G. 3. 527

NEW TRIAL.

1. The son of a juryman summoned and returned, having answered to his father's name when called on the

panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill* v. *Yates*, *E.* 50 G. 3. 229

2. Not even in the case of a trial for a capital felony; for it is only matter of challenge, and cannot be taken advantage of by the party convict as a mis-trial. *Curry's Case at Newcastle in* 1783, cited *ib.* 231

NOTICE TO QUIT,

See Tithes, 1.

A proviso in a lease for 21 years, that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, *his executors or administrators*, so to do, upon 12 months' notice to either of them, *his heirs, executors, or administrators*, extends, by reasonable intendment, to the *devisee* of the lessor, who was entitled to the rent and reversion. *Roe d. Bamford* v. *Hayley*, *T.* 50 G. 3. 464

OCCUPATION,

See Poor's Rate, 3.

OFFICE AND OFFICER.

See Escheat, Inquest, 1.

1. The several king's waiters in the port of *London* hold separate offices by different patents; and though the fees are in the first instance paid by the merchant in one entire sum to a common receiver for all; yet the aliquot shares of each are separate, and each is entitled to call for his share when in fact the sum so received is capable of being divided. These shares are now fixed by the statute 38 *Geo.* 3. *c.* 86. *s.* 19, and as the patentees die, the emoluments of each office are to be carried to a superannuation fund, for the benefit of aged and disabled officers of the customs, and are not to be applied to the benefit of the surviving patent king's waiters, which before that act had been practised. *Hudson and others* v. *Mucklow*, *E.* 50 G. 3. 273

2. *St. Albans* having first received a recorder by a charter of *Charles* 1., a subsequent charter of *Charles* 2., after nominating *J. S.* to be the first and modern recorder under that charter, declared that it should be lawful *pro prædicto* J. S. *moderno recordatore* to nominate a sufficient person *fore et esse deputatum suum in officio recordatoris*: et quod *hujusmodi* deputatus sic factus, &c. habeat et habebit as ample power in the absence of the recorder *aforesaid*, as the *recorder for the time being*, by virtue of those or any former letters patent habet aut habere et exercere *possit* et debet. Held that this did not extend the power of appointing a deputy to the successors of *J. S.* in the office of recorder; and that this, which was the plain meaning of the clause, was confirmed by another clause, "quod *recordator pro tempore existens in perpetuum* sit et erit justiciarius pacis; and by another clause, whereby power is given to *T. Richards* the town clerk, *et cuilibet communi clerico successori*, to appoint a deputy with the approbation of the mayor and aldermen: and also by the fact that no deputy had been appointed by any succeeding recorder after the first named, until a recent instance before the present appointment: though this however was attempted to be accounted for by shewing a by-law (admitted, however, to be had,) passed not long after the charter of *Charles* 2., by which the recorder's appointment of a deputy was subjected to the approbation of the mayor and aldermen. *The King* v. *The Mayor of St. Albans*, *T.* 50 G. 3. 559

ORDER OF JUSTICES.

The parish, in whose favor an order of removal is made, may by consent abandon

abandon it, without waiting to appeal to the sessions, and having it quashed there And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good. *The King* v. *The Inhabitants of Diddlebury*, T. 50 G 3. 359

ORDER OF FILIATION.

See APPEAL, 1.

OUTLAWRY.

1. Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money *or* render the principal and not absolutely to pay the condemnation, as in case of reversal of outlawry upon the stat. 31 *Eliz.* c. 3 for want of proclamations, or upon the stat. 4 & 5 *W.* & *M.* c. 18. s. 3 on appearance by attorney and by motion. *Havelock* v. *Geddes*, T. 50 G. 3. 622
2. Error assigned that the party was beyond sea at the time of the exigent promulgated is sufficient, though he was not out of the realm during the whole process of outlawry. *Seacold* v. *Hampsey*, M. 16 G. 2 B. R. cited ib. 624
3. On reversal of the outlawry on writ of error for such error assigned in a case where special bail was required in the original action, the Court will direct the recognizance of bail in answer to the new action to be taken in the alternative, to pay the condemnation money, or render the principal, and not absolutely to pay the condemnation money. ib.

PANEL.

See JURY.

PARTNERS.

1. *A.* being partner with *B.* in one mercantile house, and with *C.* in another; the house of *A.* and *B.* indorse a bill of exchange to the house of *A.* and *C.*; after which *B.*, acting for the house of *A.* and *B.*, receive securities to a large amount from the drawer of the bill, upon an agreement by *B.*, that the bill should be taken up and liquidated by *B.*'s house; and if not paid by the acceptors when due, should be returned to the drawer: held that the securities being paid, and the money received by *B.*, in satisfaction of the bill, *A.* was bound by this act of his partner *B.*, whether, in fact, known to him or not at the time, not only in respect of his partnership interest in the house of *A.* and *B.*, but also individually in other respects; and therefore he could not, in conjunction with *C.*, his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with *B.* in discharge of the same. *Jacaud and Another* v. *French and Others*, E. 50 G. 3. 317
2. *A.* and *B.*, general partners in trade, being indebted to *C.*, for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to *Spain*; with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should purchase goods for the adventure, to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to

to be made to *C.*, to go in liquidation of his demand on them; but *C.* was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to *A.* and *B.*: held that this agreement constituted a partnership between the three in the adventure *at* and from *the time of the purchase of the goods for the adventure by A.* and *B.*; although *C* did not go with them to make the purchase, to authorize them to purchase on the *joint* account; but *A.* and *B.* also in fact made the purchase; and although *C.* also purchased in his own name, and paid for goods to be sent out at the same time, in which *B* was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three. *Gouthwaite* v. *Duckworth and Others*, *E.* 50 *G.* 3. 421

PAWNBROKERS.

The pawnbrokers' act 39 & 40 *G* 3 *c.* 99. having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges, *and no more*; that taking of more is an offence within the act, cognizable by a justice of peace on summary information within the 26th section, which, (after providing specific penalties for specific offences) says that "for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not less than 40*s.*, nor more than 10*l.* in the discretion of the justice *The King* v. *Beard*, *T.* 50 *G.* 3. 673

PENALTY,

See SMUGGLING, 1. 2

PLEADING.

See BANKRUPT, 4.

1. Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expence of repairing the gates and fences of the farm; and that the value of the hay, &c., and of the repairs, should be settled by third persons; held that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him, in a count upon a general indebitatus assumpsit for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds* v *Burrows*, *H.* 50 *G.* 3. 1

2. A count in an action on the case, stating that the defendants, being owners of a ship at *Liverpool* bound on a voyage *from thence* to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at W. to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from *L.* to *W.*; and then averring that it was *the duty* of the defendants as such owners to cause the ship to proceed on the voyage *from* L. *to* W. *without deviation*; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c.; cannot be sustained, for want of alleging that the

the goods were delivered to or received by the defendants for the purpose of carriage, or *that they had notice of the shipment*; from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred: and also for want of an allegation, that the defendants *undertook to carry the goods directly to W from L*; for though the ship's ultimate destination might be *W*, yet she might have been first destined to other places on a coasting voyage. *Max v. Roberts, H* 50 G. 3 89

3. To trespass and false imprisonment, a plea of alien enemy not allowed to be pleaded, together with a special justification inconsistent therewith and the general issue. *Truckenbrodt v. Payne, H* 50 G. 3. 2[illegible]

4. Pleading of a *p[illegible] fee simple*, as it is to be understood in the annuity act, vide ANNUITY, 1.

5. The plea of an attorney to an action sued against him by bill, stating his privilege not to be compelled to answer any bill to be exhibited against him *in the custody of the marshal*, &c. and concluding that the Court would not take *further cognizance of the action aforesaid against him*, (instead of praying judgment of the bill, and that it might be quashed,) will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its officers *in that form*; and therefore the Court will adjudge the bill to be quashed. *Cleland v. Thornley, T.* 50 G. 3. 514

6. To an action on a replevin bond, conditioned for the defendant to prosecute his suit below *with effect*, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead, that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was *still depending and undetermined*: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same*, and that the said suit *is not still depending*; without shewing how it was determined and ceased to depend. *Brackenbury v. Pell, T.* 50 G. 3. 585

PLENE ADMINISTRAVIT.

On plea of plene administravit, proof of an admission by the executor, *that the debt was just and should be paid as soon as he could*, is not evidence to charge him with assets. *Hindsley v. Russell, L.* 50 G. 3. 232

POOR'S-RATE.

See RATE.

1. Commissioners under the *Beverley* and *Barmston* drainage act, who purchased land and erected buildings in the parish of *Sulcoates* for the outlet of the drainage, but who received no benefit from such property in *Sulcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet are not rateable in *Sulcoates* for such benefit. *The King v. The Churchwardens, &c. of Sulcoates, H.* 50 G. 3. 40

2. The tolls of a lighthouse situated in the township of *Tynemouth*, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable quà tolls, in the township. *The King v. The Inhabitants of Tynemouth, H.* 50 G. 3. 46

3. And the residence in such lighthouse by one as servant of the owner, at an annual salary, to take care of the light, is the occupation of the master,

ter, who alone can be rated in respect of such occupation of the toll-house. *The King* v. *The Inhabitants of Tynemouth*, *H.* 50 *G.* 3. 46

4. An act of parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rochdale* canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation; held that a poors' rate on his trustees, occupiers of the "*Rochdale canal lock, tunnel, dues, or rates,*" (which *dues* or *rates* are only other names for the *lock* rated therewith,) is good, though the trustees were found not to be *inhabitants* of the township for which the rate was made. *The King* v. *Sir A. Macdonald and Others*, *E.* 50 *G* 3. 324

5. Though the sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated: yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stocks, by which they could amend a rate which omitted them; that concludes the question. *ib.*

6. The lessee and occupier of an ancient and exclusive ferry not being an *inhabitant resiant* within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be *real* property, it is not such real property as is mentioned in the stat. 43 *Eliz.* c. 2. the occupancy of which subjects the party to be rated to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *The King* v. *Nicholson*, *E.* 50 *G.* 3. 330

7. The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground; the soil itself at the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it. *Williams, Executrix of Williams*, v. *Jones*, *E.* 50 *G.* 3. 346

8. Landlords not resident within the parish, having leased lead mines and other minerals, with liberty to the tenants to dig, &c.; reserving a certain annual rent, and also certain proportions of the ore which should be raised, are not at any rate assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be found. *The King* v. *The Bishop of Rochester and Others*, *E.* 50 *G.* 3. 353

9. The lessee of the *tolls* of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the *occupier* of any local visible property within the parish, nor that he was an *inhabitant resiant* there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge. *The King* v. *Eyre*, *E.* 50 *G.* 3. 416

10. Where the appellant disputed before the Sessions the quantum of the rate,

rate, as well as the rateability of the property for which he was assessed, which was tithe rents and compositions under an inclosure act; it is not enough for the parish officers to shew that he was in the receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *The King* v. *Topham*, *T.* 50 *G.* 3. 546

11. A rate to *reimburse* churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part *retrospective*; and therefore the Court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the Court would not grant the mandamus to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves. *The King* v. *The Chapelwardens of Haworth, in Bradford, &c. T.* 50 *G.* 3. 556

POOR-REMOVAL, ORDER OF.

The parish, in whose favour an order of removal is made, may by consent abandon it, without waiting to appeal to the sessions and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good. *The King* v. *The Inhabitants of Diddlebury*, *E.* 50 *G.* 3. 359

POWER.

1. Under a power to lease for 21 years *reserving the best rent*, so as the lease should not contain any clause whereby authority should be *given* to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste; and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: held that a lease was good, though the lessor thereby took the repairs of the mansion house (excepting the glass windows) on himself, and covenanted if he did not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c. on the same terms: because the covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man. *Doe d. Sir R. Bromley, Bart.*, v. *Bettison*, *E.* 50 *G.* 3. 305

2. The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown. *ib.*

5. Power to trustees to lease, *See* Devise, 4.

PRACTICE,

See Attorney's Bill.

1. As to the time of preferring a claim of conusance. Vide Conusance, 1. art. 3.

2. Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their

their order, as in all other cases. *The King* v. *Knill, H.* 50 *G.* 3. 50

3. It is the practice of the court at *Chester* to grant a special jury, on application, in a cause which is sent to trial there by mittimus out of *B. R.*: and it seems that the objection, if any, is cured by the party's appearance. *Massey* v. *Johnson, H.* 50 *G.* 3. 69

4. Serving notice of declaration filed, together with the writ, at the same time, is irregular. *Steward* v. *Lund. H.* 50 *G.* 3. 116

5. The affidavits made in answer to a rule nisi for an attachment must be entitled on the *civil* side of the court in the cause out of which the motion arises: but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are entitled on the crown side. *Whitehead* v. *Firth, H.* 50 *G.* 3. 165

6. To trespass and false imprisonment, a plea of alien enemy was not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbrodt* v. *Payne, H.* 50 *G.* 3 206

7. The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin* v. *Guerss, E* 50 *G.* 3. 247

8. The stat. 48 *G.* 3. *c.* 149. *sched.* 2. requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4*d.* per sheet is imposed, and it not having been the practice to write such copies on *both sides* of the stamped sheet of paper: held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. *Champneys* v. *Hamlin, E.* 50 *G.* 3. 294

9. Upon a motion to refer it to the Master to compute principal, interest, and costs upon a bill of exchange, drawn in *Scotland* upon and accepted by the defendant in *England*, the Court will not direct the Master to allow re-exchange. *Napier* v. *Shneider, E.* 50 *G.* 3. 420

10. Where the defendant was residing in *London* before and at the commencement of the action, eight days notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from *London*, (to *Tortola*,) if he did not give the plaintiff previous notice of such removal. *Rochfort* v. *Robertson, E.* 50 *G.* 3. 427

PREROGATIVE,

See Bridges, 1. Escheat, Inquest of.

PRINCIPAL AND AGENT.

See Assumpsit, 4.

PRISONER,

See Practice, 8.

PRIZE,

See Assumpsit, 4.

PROHIBITION,

See Modus.

RATE,

See Canal, 1. County Rate. Highway Rate. Poor's Rate.

Upon an appeal to the sessions against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting when called upon by the sessions that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common

common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal and decided upon them, notwithstanding an objection made by the respondent, that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this Court refused to quash their order, which was removed by certiorari. *Rex* v. *Shaw*, *T.* 50 *G.* 3. 479

RECEIVER.

It seems that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe d. Marsack and Others* v. *Read*, *H.* 50 G. 3. 57

RECORDER,

See OFFICER, 2.

REMOVAL, ORDER OF,

See POOR REMOVAL.

RENEWAL OF LEASE,

See POWER, 1.

REPAIR,

See POWER, 1. 2.

REPLEVIN BOND.

To an action on a replevin bond, conditioned for the defendant to prosecute his suit below *with effect*, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was *still depending and undetermined*: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same, and that the said suit is not still depending*; without shewing how it was determined and ceased to depend. *Brackenbury* v. *Pell*, *T.* 50 *G.* 3. 585

REVENUE OFFICER KILLED,

See SMUGGLING.

RIVER WATER,

See COMPENSATION.

SALE.

A. having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price, and *B.* sold the same to *C.* and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order, but no actual delivery was made of the 10 tons, which continued mixed with the rest in *A.*'s cistern: yet held that this was a complete sale and delivery in law of the 10 tons by *B.* to *C.*; nothing remaining to be done on the part of the seller, though as between him and *A.* it remained to be measured off: and therefore that *B.* the seller, could not, upon the bankruptcy of *C.*, the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the 10 tons to the buyer: nor were the goods in transitu, so as to enable the seller to stop them.

SEISIN IN FEE,

See ANNUITY, 1.

SESSIONS,

See APPEAL CANAL, 1. OR JURISDICTION, 1.

Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases. *The King* v. *Knill, H.* 50 G. 3. 50

SET OFF,

See BROKER.

SETTLEMENT — *By Apprenticeship.*

An indenture binding out a poor apprentice, executed by *W. S* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negativing its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 21., and only *one* churchwarden, *by custom*, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King* v. *The Inhabitants of Hinckley, E.* 50 G. 3. 361

SETTLEMENT — *By Hiring and Service.*

1. Where the master died three weeks after hiring the pauper for a year the latter, abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served. And it is no less an abiding in the service for a year, because one of the sons, on the frivolous pretence that the servant threw more sand on the floor than he deemed necessary, turned her out of doors 3 weeks before the end of the year, she being willing and offering to stay to the end of the year, but carrying away her cloaths the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages. *The King* v. *The Inhabitants of Hardham-with-Newton, H.* 50 G. 3. 58
2. A hiring at so much a week, for as long time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained. *The King* v. *The Inhabitants of Mitcham, E.* 50 G. 3. 351
3. A servant, 11 weeks before the end of his year, on a quarrel with his master, applied for his *discharge*; which his master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day labourer for the remainder of the year: held that this was proper evidence from whence the sessions might draw the conclusion of a dissolution of the contract; though it was encountered by the evidence of the servant, that his master said to him at the time, that if the other man did otherwise than well, he could send for the servant and make him serve out his time; to which the latter assented: which account was, in the judgment of the sessions,

ſeſſions, impeached by the maſter's having no recollection of having ſo ſaid, and ſaying that he had not any *intention* to have the ſervant back, they having parted on bad terms; which latter expreſſion the Court received, not *as evidence* per ſe of the maſter's *intention*, but only *as a reaſon* aſſigned by him, why he was not likely to have ſaid what the ſervant ſtated. *The King* v. *The Inhabitants of Mildenhall*, *T*. 50 G. 3. 482

4. The ſeſſions ſtated the fact that the pauper was hired on *Michaelmas* day, 10th of *Oct*. 1797, for a year ending on *Michaelmas* day, 10th *Oct*. 1798; that he continued to ſerve till the 8th of *October*, when he married, and *his maſter conſented to his leaving his ſervice*, and paid him his wages, and on the 9th the pauper hired himſelf to and went into the ſervice of another maſter: held by one Judge, that theſe facts would have warranted the ſeſſions in drawing a concluſion of fact, that the maſter diſpenſed with the ſervice for the remaining day of the year; but the ſeſſions having impliedly drawn a different concluſion by quaſhing the order of removal, all the Court held that the caſe, as ſtated, ſhewed a diſſolution of the contract before the end of the year, and conſequently that no ſettlement could be gained by ſuch hiring and ſervice. *The King* v. *The Inhabitants of Maidſtone*, *T*. 50 G. 3. 550

SHIP.

The ſtat. 26 *G*. 3. *c*. 60. *ſ*. 17. avoiding a bill of ſale of a regiſtered ſhip, which does not truly and accurately recite the certificate of regiſtry; where parties by miſtake miſ-recited in a bill of ſale the certificate of regiſtry, by ſtating *Guernſey* as the port where the certificate was granted inſtead of *Weymouth*; which miſtake was rectified when diſcovered by conſent of all parties, and the deed delivered de novo: held that no new ſtamp was neceſſary upon ſuch re-execution; the deed taking no effect from its firſt delivery, and the effect ariſing not from intention but from miſtake, and the alteration merely making the contract what it was originally intended to have been. *Cole and Others*, *Aſſignees of Doyle*, *a Bankrupt*, v. *Parkin*, *T*. 50 G. 3. 471

SMUGGLING.

An action of debt for 100*l*. lies upon the ſtat. 19 *G*. 2. *c*. 34. *ſ*. 6. againſt the inhabitants of a lath in *Kent* by the executor of a revenue officer, who being in a boat between high and low water mark in purſuit of a ſmuggling boat in which were offenders againſt the act, received a mortal wound by a ſhot fired by a perſon on the ſhore within the lath: though the officer afterwards died on the high ſea beyond the low water mark, and conſequently *out of the lath*; and the act gives the remedy againſt the inhabitants of the lath, &c. where the fact ſhall be committed, i. e. where the officer endeavouring to apprehend offenders ſhall be *killed*. *Groſvenor*, *Executor of Ellis*, v. *The Inhabitants of the Lath of St. Auguſtine*, *in the County of Kent*, *E*. 50 G. 3. 244

Qu. The application of the ſtat. 8 *G*. 2. *c*. 16. as to the mode of levying the money recovered, which by the act is directed to be by two juſtices of the peace of the *county*, *riding*, *or diviſion*, where the fact happened within the juriſdiction of the *Cinque Ports*, which has an excluſive commiſſion of the peace. *ib*.

STAMP.

1. Nothing being referred to appraiſers except the mere value of goods and

of the repairs of a farm, an appraisement stamp upon the written valuation is sufficient under the statute 46 G. 3 c. 43 and an award stamp is not necessary. *Leeds* v. *Burrows*, *H.* 50 G. 3. 1

2. The same paper containing two different contracts for the purchase of different lots by different persons at an auction, one stamp affixed on that part of the paper which contained the contract of sale with the defendant, and to which the stamp officer's receipt for one penalty referred, is sufficient to legalize the evidence of such contract. *Powell* v. *Edmunds*, *H.* 50 G. 3. 6

3. The stat. 48 G. 3. c. 149. *sched.* 2. requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4*d.* per sheet is imposed; and it not having been the practice to write such copies on *both sides* of the stamped sheet of paper; held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. *Champneys* v. *Hamlin*, *E.* 50 G. 3. 294

4. The stat. 26 G. 3. c. 60. *s.* 17. avoiding a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry; where parties by mistake misrecited in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed delivered de novo: held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. *Cole and Others, Assignees of Doyle, a Bankrupt*, v. *Parkin*, *T.* 50 G. 3. 471

STATUTES.

Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent, that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by certiorari. *The King* v. *Shaw*, *T.* 50 G. 3. 479

Hen. VI.

8. c. 16. Escheat. Inquisition 96
18. c. 6. Escheat. Inquisition *ib.*

Hen. VIII.

22. c. 5. Bridges 192
23. c. 15. Costs 668

Edward VI.

2 & 3. c. 8. Inquisition or Office 96
c. 13. Tithes 83. 239

Elizabeth.

13. c. 29. *Cambridge* University 12
43. c. 2. Poor's rate 324. 330. 353

Charles II.

13 & 14. c. 12. *s.* 21. Overseers of poor 361
29. c. 3. *s.* 5. Stat. of frauds. Witness to will 250
Interest in land 513

Anne.

Anne.

8. *c.* 12. *Liverpool* 439

George II.

2. *c.* 23. *f.* 23. Attorney's bill 372
*8. *c.* 16. Hue and cry 244
12. *c.* 29. County rate 117
14. *c.* 17. *f.* 4. Trial 428
19. *c.* 34. Smuggling 244
20. *c.* 19. Apprentice 248
Conviction. Collier 572
25. *c.* 6. Executor 252

George III.

2. *c.* 86. *Liverpool* 439
6. *c.* 25. Conviction. Collier 572
13. *c.* 78. *f.* 47. Highway act 366
17. *c.* 26. Annuity act 263
26. *c.* 60. *f.* 17. Ship register 471
33. *c.* 54. Friendly society act 280
38. *c.* 63. *Beverley* and *Barmston* drainage act 41
c. 86. Custom-house offices 273
39. *c.* 69. *West India* dock act 518
39 & 40. *c.* 47. *London* dock act 527
c. 99. Pawnbroker's act 673
41. *c.* 23 *f.* 6. Poor's rate 3'6
43. *c.* 1,2. Warehousing act 527
c. 140 *Bristol* 429
c. 141 Justices of peace 67
c. 153. *f.* 15 and 16. Navigation 296
45. *c.* 54. Navigation *ib.*
46. *c.* 43. Stamps 1, 6
48. *c.* 11. *Bristol* 429
c. 149. *sched.* 2. Law stamps 294
49. *c.* 121. *f.* 8. Bankrupt 660. 664

SUPERCARGO.

Where a supercargo and agent on board the vessel has the like authority in the absence of his principal, even before the vessel fails from this country, to alter the destination, vide CHARTERPARTY, 2. *Davidson* v. *Gwynne*, *E.* 50 *G.* 3. 381

SURRENDER, CONDITIONAL OF TERM,

See LANDLORD AND TENANT, 1.

TENANTS IN COMMON,

See EJECTMENT, 2. 4. JOINT TENANTS AND TENANTS IN COMMON.

TENANT IN TAIL AFTER POSSIBILITY, &c.

By settlement before marriage, the husband's estate was conveyed to trustees to the use of the husband for life, sans waste; remainder to trustees, &c.; remainder to the use of the wife *for life, for her jointure*, and in bar of dower; remainders to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; *remainder to the heirs of the body of the husband and wife*; remainder to the right heirs of the husband: the wife survived the husband, and had no issue; and after possibility of issue by the husband extinct; held that she was tenant in tail after possibility, &c.; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams*, v. *Williams*, *E.* 50 *G.* 3. 209

TENURE,

See ESCHEAT, INQUEST OF,

TIMBER,

See TENANT IN TAIL AFTER POSSIBILITY, &c.

TITHES.

1. Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought

brought on the stat. 2 & 3 *Ed.* 6. c. 13. for not setting out the tithes, the vicar, in a conversation with the farmer, demanded his *tithes vicarial*; on which the other tendered him 40s., (the annual composition,) which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal: and held also that the farmer, not having denied the vicar's right to tithes in kind before the action brought, was not precluded from taking the objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind. *Bel* v. *Wilson, H.* 50 *G.* 3. 83

2. A notice on the 8th to determine a composition for tithes from year to year, commencing on the 29th of *September*, is not a sufficient notice. *Hewitt and Others* v. *Adams, Dom Proc.* 1782, cited *ib.* 84

3. Though by the general rule a farmer may not at his pleasure tithe and carry *part* of a field of corn which has been cut, before *the whole be tithed*, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another time to take his tithe; which general rule, however, being levelled against fraud, vexation, and caprice, must, where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop: yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish, before he proceeds to tithe any part of the same field lying in another parish. And therefore, where a farmer cut the whole of a field of barley lying in the two parishes of *A.* and *B.*, and after rolling (*i. e.* cocking) and tithing part in *A.*, proceeded to roll and tithe part in *B.*, and the weather being catching, he carried that part which was tithed in *A.* the day before the rest of the field in *A.* was rolled and tithed; and this without previous notice of his intention to carry such part: held that this being done bonâ fide was lawful. *Leathes, Clerk,* v. *Lewinson, E.* 50 *G.* 3. 239

TOLLS,

See Poor's-Rate.

TRADING COMPANY.

A bond given to trustees to secure the faithful services of a clerk to the *Globe* Insurance Company, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk committed at any time during his continuance in the service of the actually existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalfe, Bart., and Others,* v. *Bruin, E.* 50 *G.* 3. 400

TRADING WITH ENEMY.

1. A licence to export goods to certain places within the influence of the enemy

enemy interdicted to *British* commerce, granted to *H. N.* on [illegible] of himself and other *British* merchants, &c. is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson and Others* v. *Janson*, *E.* 50 *G.* 3. 223

2. An insurance having been made on goods at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad, which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had failed, and been seized and confiscated; held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom and Others* v. *Bruce*, *E.* 50 *G.* 3. 225

3. As the king cannot license the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British* as well as enemy's property in that manner, (the former of which is legalized by the stat. 43 *G.* 3. *c.* 153. *f.* 15, 16. and 45 *G.* 3. *c.* 34.) the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured; the assured not resisting their claim to that extent. *Shiffner* v. *Gordon and Another*, *E.* 50 *G.* 3. 296

4. In [illegible] case, where a licence was granted to cover a *British* adventure out and home to and from the *Spanish South American* colonies, upon condition that the licensee should export a certain proportion of *British* manufactures for the voyage out; and it afterwards appeared that the greatest part of the outfit was made up of *Spanish* goods, and only a very small quantity, merely nominal, of *British* manufactures; this was deemed to be colorable and in fraud of the licence, and therefore did not protect an insurance thereon. *Gordon* v. *Vaughan*, *E.* 49 *G.* 3. *B.R.* cited *ib.* 302

5. Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, sought to protect the adventure under the king's licence to trade with the enemy; it was not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of a *general* licence, dated three months before, licensing *six neutral vessels*, under certain neutral flags, to pass unmolested *to or from any port of* Holland *from or to any port of this kingdom*, with certain goods, (including the goods insured;) which licence was directed to *R. S.* and *other British merchants*; with a condition annexed, that they should cause the licence to be delivered up to them or their agents, when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his use of it was lawful, as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence. *Barlow* v. *M'Intosh*, *E.* 50 *G.* 3. 311

TRESPASS.

See CONVICTION, 2.

1. The stat. 43 G. 3. c. 141. does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey* v. *Johnson*, *H.* 50 *G.* 3. 67

2. The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. *ib.*

3. After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal. *Crosby* v. *Leng*, *E* 50 *G.* 3. 409

TRIAL.

1. The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin* v. *Guerss*, *E.* 50 *G* 3. 247

2. Notice of, see PRACTICE, 10.

TRUST.

Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain* 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the 3000*l.* and discharge the bond; and subject thereto, to the use of his son in fee, on his attaining 21: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust by sale, lease, or mortgage of the same, to raise 5000*l.* and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as t[hey] should think proper, to raise money to pay his debts, legacies, and funeral expences; and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue, with further trusts if either or both of them died under 21: with a

Proviso, "that it should be lawful for the trustees, and the survivor, at any time or times *till all* the said lands, &c. devised to them *should actually become vested in any other person or persons, by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid*, to lease the same or any part thereof," for any term of years not exceeding 14, at the best rent:—

Held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive*